

(22,998)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 159.

D. E. FOOTE & COMPANY, INCORPORATED, ET AL.,  
PLAINTIFFS IN ERROR,

vs.

CHARLES H. STANLEY, COMPTROLLER OF THE STATE  
OF MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

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a MARYLAND, *set*:

At a session of the Court of Appeals of the said State, begun and held at the City of Annapolis, on the first Monday of October (being the second day of the said month), in the year of our Lord one thousand nine hundred and eleven and in the one hundred and thirty-sixth year of the Independence of the United States of America.

## Present:

Hon. A. Hunter Boyd, Chief Judge; Hon. John P. Briscoe, Hon. James A. Pearce, Hon. N. Charles Burke, Hon. Wm. H. Thomas, Hon. John R. Pattison, Hon. Hammond Urner, Hon. Henry Stockbridge, Associate Judges.

C. C. MAGRUDER, *Clerk*.

Among others, were the following proceedings, to wit:

- 1 Transcript of Record from the Circuit Court of Baltimore City in the Case of

D. E. FOOTE & COMPANY, a Corporation Duly Incorporated under the Laws of the State of Delaware, et al., Appellants,

vs.

CHARLES H. STANLEY, Comptroller of the State of Maryland.

To the Court of Appeals of Maryland.

Whitelock, Deming & Kemp, for Appellants.  
Frederick Dallam, for Appellee.

- 2 In the Court of Appeals of Maryland.

Appeal from the Circuit Court of Baltimore City.

*Bill of Complaint.*

(Filed 13th September, 1911.)

In the Circuit Court of Baltimore City.

D. E. FOOTE & COMPANY, a Corporation Duly Incorporated under the Laws of the State of Delaware; William H. McGee, Trading as Wm. H. McGee & Company; J. Langrall & Brother, a Corporation Organized under the Laws of the State of Maryland, and the C. L. Applegarth Company, a Corporation organized under the Laws of the State of Maryland,

vs.

CHARLES H. STANLEY, Comptroller of the State of Maryland.

To the Honorable Judge of said Court:

Your orators complaining, say:

1. That they are engaged in the business of packing oysters at their respective factories located in the city of Baltimore, and in

connection with their said business, each of them is a large buyer of oysters in the shell taken and brought in vessels and cars from the oyster beds located within the States of Maryland, Virginia and New Jersey, respectively.

2. Chapter 413 of the Acts of the General Assembly of Maryland, passed at the session of 1910, entitled "An Act to repeal and reenact with amendments Sections 1, 2, 18, 19, 23, 31 and 69 of Art. 72 of the Code of Public General Laws of the State of Maryland, title 'Oysters,' provides in part as follows, viz:

"SEC. 69. It shall be the duty of the Commander of the State Fishery Force, at the commencement of, or during the oyster season in each year, to appoint from the counties producing oysters for packing purposes in the State, not exceeding twenty, special inspectors, to be appointed as follows: Two each from Anne Arundel, St. Mary's, Talbot and Wicomico Counties; three each from Dorchester, Somerset and Queen Anne's Counties, and one each from Kent, Calvert and Charles Counties, at a salary of forty-five dollars per month, during the oyster season, and they shall be stationed at such places as in the judgment of the Commander of the State Fishery Force their services may be needed. Before assuming the duties of their offices, the said special inspectors shall take an oath, to be administered by the Commander, to diligently and faithfully discharge the duties of their said offices; the said special inspectors shall inspect all oysters in the district to which he is assigned; upon the inspection of any such oysters, each special inspector shall make a certificate of the number of bushels in triplicate, one of which shall be given to the purchaser, one to the seller, and the other daily to the general measurer and inspector of the district where such inspection occurred; a charge of one cent per bushel is hereby levied to help defray the expenses of such inspection and the other expenses of the State Fishery Force, upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels, to be charged equally to the buyer and seller, but to be paid weekly to the Comptroller of the State Treasury, or his agent, by the buyers; the certificate given the general measurer and inspector shall be by him mailed weekly to the Comptroller or his agent, and in case the amounts of money shown to be due be not paid in one week thereafter to the Comptroller or his agent, which is hereby required to be done, the properties of the parties so indebted may be levied on and sold by the said Comptroller or

4 his agent, as in cases of taxes in default, without other process of law; the tax of one cent per bushel hereby levied is also made a charge on oysters sold by commission merchants and others selling by less than the cargo, and also a tax of three cents per barrel containing not more than three bushels; on oysters in bags a tax of two cents per bag containing not more than two bushels; and all transportation companies carrying oysters in the shell, consigned to Baltimore shall furnish to the oyster inspector or collector of oyster tax a copy of his manifest showing the number of bushels on board on arrival of steamer and to whom consigned, and the special inspectors are charged with the duty of seeing that proper returns are made for the purpose of this Act



by such commission merchants or retailers; and in the performance of the duty the said special inspectors are authorized and directed to visit the places where oysters less than cargoes are sold and get from such sellers a statement, under oath, as to the number of bushels sold from time to time, and return to the general measurers and inspectors a certificate thereof to be forwarded to the Comptroller, as required in the case of the certificates for cargoes and the payment of the amounts so found to be due shall be similarly enforced. All such special inspectors may be removed at any time by the Commander for neglect or malfeasance in office, and said Commander shall report to the Governor any neglect of a general measurer or inspector. The Commander of the State Fishery Force shall furnish to each of said special inspectors certificates in book form, supplied with carbon paper, so that each of said triplicate certificates shall be exactly the same, the form of the certificates shall be as follows:

— —, 19—.

I hereby certify that I have this day inspected for Captain — —, a schooner — —, a cargo of oysters, sold to — —, and found the same to contain — bushels of merchantable oysters, and — bushels of unmerchantable oysters.

Signed

— —."

5 3. Your orators are advised and therefore aver that the respective charges or taxes prescribed by said Act are illegal, and that the Act itself is unconstitutional and void:

(a) Because said Act is repugnant to Art. 1, Sec. 8 of the Constitution of the United States which vests in Congress exclusive power to "regulate commerce with foreign nations and among the several States and with the Indian Tribes." In that the charges or taxes therein prescribed interfere with the freedom of commerce among the several States, and the exclusive power of Congress over the same.

(b) Because the said Act is repugnant to Art. 1, Sec. 10, of the Constitution of the United States which provides that "no State shall without the consent of the Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws, in that said Act provides that the charges or taxes therein prescribed are "to help defray the expenses of such inspection and the other expenses of the State Fishery Force," and that said charges or taxes are used for purposes other than the execution of the inspection law of the State of Maryland, and that the charges or taxes therein prescribed are far in excess of what is needed for the execution of the inspection laws of said State.

(c) Because said Act is repugnant to Art. 15 of the Bill of Rights of the Constitution of the State of Maryland, which provides that "every person in the State or persons holding property therein ought to contribute his proportion of public taxes for the support of the Government according to his actual worth in real or personal property; yet fines, duties or taxes may properly and justly be

imposed or laid with a political view for the good government and benefit of the community," in that said Act imposes a direct tax upon property and not upon the owner thereof, and that quite irrespective of the value of said property, the said tax is not "laid with a political view for the good government and benefit of the community."

(d) Because said Act is in other respects repugnant to the Constitution of the United States and the Constitution of the State of Maryland.

4. The defendant, Charles H. Stanley, Comptroller of the State of Maryland, has notified your orators that he intends to proceed forthwith by way of distraint, to be levied in accordance with the provisions of said Act, to collect from your orators the charges or taxes prescribed by said Act upon oysters bought by your orators respectively, as follows, viz:

6 From your orator D. E. Foote & Co. the tax of one cent per bushel on 191,955 bushels of oysters (State's count) bought by said company from the week ending November 12th, 1910, to the week ending April 29th, 1911, that is to say, the sum of \$1,919.55;

From your orator William H. McGee & Co., the said tax of one cent per bushel on 159,364 bushels of oysters (State's count) bought by said company from the week ending October 29th, 1910, to the week ending April 29th, 1911, that is to say the sum of \$1,593.64;

From your orator J. Langrall & Bro., the said tax of one cent per bushel on 166,365 bushels of oysters (State's count) bought by said company from the week ending November 12th, 1910, to the week ending April 22d, 1911, that is to say the sum of \$1,663.65; and

From your orator the C. L. Applegarth Company, the said tax of one cent per bushel on 92,955 bushels of oysters (State's count) bought by said company from the week ending October 29th, 1910, to the week ending April 15th, 1911, that is to say the sum of \$929.55.

5. The defendant has, moreover, failed to credit upon the respective amounts so claimed from your orators as aforesaid the excess tax levied under the provisions of Chapter 735 of the Acts of the General Assembly of Maryland passed at the session of 1910, (which Act has been since declared unconstitutional by a decision of the Court of Appeals of Maryland) upon oysters theretofore purchased by them, the amounts of said excess so paid by your orators respectively being fully known to the defendant.

6. A considerable portion of said oysters so purchased by your orators, respectively, was taken and brought in vessels or cars from the oyster beds located within the States of Virginia and New Jersey, and the remaining portion of said oysters was taken and brought in vessels or cars from the oyster beds located within the State of Maryland.

7. Proceedings under said distraints now threatened will result in irreparable damage and injury to your orators respectively, and your orators are without adequate relief in the premises except by the intervention of this Honorable Court.

To the end, therefore;

(1) That the said Charles H. Stanley, Comptroller, may be forever enjoined from collecting or in any manner proceeding, whether by distraint or otherwise, to collect from your orators, or any of them, the charges or taxes prescribed by the said Act of 1910, Chapter 413.

(2) And that your orators may have such other and further relief as their case may require.

May it please your Honor to grant unto your orators the writ of subpoena directed to the said Charles H. Stanley, Comptroller, whose office and place of business is at Annapolis in Anne Arundel County, State of Maryland, commanding him to be and appear, either in person or by solicitor, in this Court on some certain day to be named therein or show cause, if any they have, why a decree ought not to be passed as prayed.

And as in duty bound, etc.

D. E. FOOTE & CO.,  
By HAMPTON STEELE;  
W. H. MCGEE & CO.,  
J. LANGRALL & BRO., INC.,  
LEANDER LANGRALL, *President*;  
C. L. APPLGARTH CO.,  
By HARRY A. SCHLEGEL, *Sec.*, *Plaintiffs.*

WHITELOCK, DEMING & KEMP,  
*Counsel.*

STATE OF MARYLAND,  
*Baltimore City, To wit:*

I hereby certify that on this 7th day of —, 1911, before the subscriber a Notary Public of the State of Maryland in and for  
8 Baltimore City aforesaid, duly commissioned and qualified, personally appeared Hampton Steele, Secretary and Treasurer of D. E. Foote & Company, Incorporated, William H. McGee, Leander Langrall, President of J. Langrall & Bro., Inc., and Harry A. Schlegel, Secretary and Treasurer of the C. L. Applegarth Co. and each made oath in due form of law that the matters and facts stated in the foregoing bill of complaint are true to the best of their knowledge and belief. And the said Hampton Steele, Leander Langrall and Harry A. Schlegel further made oath that they are the agents of the said D. E. Foote & Co., J. Langrall & Bro. and C. L. Applegarth Co., respectively, and duly authorized by them to make this affidavit in their behalf, and that they have personal knowledge of the facts therein stated.

Witness my hand and Notarial Seal.

[SEAL.]

EDWARD H. SAPPINGTON,  
*Notary Public.*

*Answer.*

(Filed 18th September, 1911.)

In the Circuit Court of Baltimore City.

D. E. FOOTE AND COMPANY, a Corporation, Etc., et al.,

VS.

CHARLES H. STANLEY, Comptroller of the State of Maryland.

To the Honorable, the Judge of said Court:

The Answer of Charles H. Stanley, Comptroller of the State of Maryland, defendant in this cause, to the Bill of Complaint of D. E. Foote and Company, a corporation, and others, against him in this Honorable Court exhibited—

This defendant, answering, says:

- (1) He admits the allegations contained in paragraph 1 of said Bill of Complaint—
- 9 (2) He admits the allegations contained in paragraph 2 of said Bill of Complaint—in the words of the published Act—
- (3) He submits the allegations of paragraph 3 of said Bill of Complaint as matters of law, to be determined by this Honorable Court upon a hearing—
- (4) He admits the allegations contained in paragraph 4 of said Bill of Complaint—
- (5) He admits the allegations contained in paragraph 5 of said Bill of Complaint—and further answering this paragraph this defendant alleges that the complainants herein are indebted unto the State of Maryland, on account of the charge or tax upon oysters provided by Section 69 of Article 72 of the Code of Public General Laws of Maryland, in the amounts set out in paragraph 4 of said Bill of Complaint, charged against them, respectively, and that this respondent is without warrant or authority in law to refund to them, or any of them, or to allow any set-off or counter-claim of them, or any of them, for or on account of any amounts paid by them, or any of them, and received into the treasury of the State of Maryland under the provisions of Chapter 735 of the Acts of 1910—
- (6) He admits the allegations contained in paragraph 6 of said Bill of Complaint—
- (7) He denies the allegations contained in paragraph 7 of said Bill of Complaint—
- (8) He denies all the allegations of fact contained in the said Bill of complaint which are not specifically admitted in this his answer—
- (9) And he insists upon all matters of defense to the merits of said Bill of Complaint of which he might have availed himself by demurrer thereto—

And, having answered the said Bill of Complaint so far as he is advised that it is necessary for him so to do, he prays to be hence dismissed with his reasonable costs in this behalf expended.

FREDERICK DALLAM,

*Solicitor for Defendant.*

*Cross-Bill of Complaint.*

(Filed 18th September, 1911.)

In the Circuit Court of Baltimore City.

CHARLES H. STANLEY, Comptroller of the State of Maryland, for  
and on behalf of the State of Maryland.

VS.

D. E. FOOTE AND COMPANY, a Corporation; WILLIAM H. MCGEE,  
Trading as Wm. H. McGee & Company; J. Langrall & Bro., a  
Corporation Organized under the Laws of the State of Maryland,  
and the C. L. Applegarth Company, a Corporation Organized  
under the Laws of the State of Maryland.

To the Honorable, the Judge of said Court:

Your orator complaining, says:

(1) That, heretofore, the said D. E. Foote and Company, Wm. H. McKee & Company, J. Langrall & Brother and C. L. Applegarth Company filed their Bill of Complaint against him in this Court alleging, among other things, that your orator was about to distrain against them for the collection of certain oyster taxes or charges due by them and provided by Section 69 of Article 72 of the Code of Public General Laws of Maryland; that the said taxes or charges are illegal, and the Act providing for the same is unconstitutional and void; that he failed to credit upon the amounts so claimed the excess of taxes levied under the provisions of Chapter 735 of the Acts of 1910, since declared unconstitutional; and that the proceedings under the threatened distraints will result in irreparable damage and injury to them, and that they are without adequate relief except by the intervention of this Court, and thereupon they prayed  
11 that your orator might be forever enjoined from collecting or in any manner proceeding, whether by distraint or otherwise, to collect from them the taxes or charges prescribed by the Act of 1910, Chapter 413, and for such other and further relief as their case may require—

(2) That your orator has answered said Bill of Complaint, and in his answer has shown that the said D. E. Foote and Company, Wm. H. McGee & Company, J. Langrall & Brother and C. L. Applegarth Company are not entitled to any relief in this Honorable Court, but on the contrary thereof, your orator of right, and by the rules and practice of equity, ought to have relief in the premises; all of which matters will more fully appear by reference to said Bill of Answer—

(3) That the said defendants herein have purchased oysters, at their respective factories in the city of Baltimore, in the State of Maryland, within the respective times, and in the respective amounts hereinafter set forth, and are indebted unto the State of Maryland for the tax or charge upon sales of oysters within the said State,

under the provisions of Section 69 of Article 72 of the Code of Public General Laws of Maryland, as follows, respectively, to wit:

D. E. Foote and Company, from Nov. 12th, 1910, to April 29th, 1911, 191,955 bushels of oysters.....	\$1,919.55
Wm. H. McGee & Company, from Oct. 29th, 1910, to April 29th, 1911, 159,364 bushels of oysters.....	1,593.64
J. Langrall & Brother, from Nov. 12th, 1910, to April 22nd, 1911, 166,365 bushels of oysters.....	1,663.65
C. L. Applegarth Company, from Oct. 29th, 1910, to April 15th, 1911, 92,955 bushels of oysters.....	929.55

To the end therefore—

(1) That the amounts owing by the said D. E. Foote and Company, Wm. H. McGee & Company, J. Langrall & Brother and C. L. Applegarth Company to the State of Maryland, for the tax or charge provided by Section 69 of Article 72 of the Code of Public General Laws of the State of Maryland may be ascertained, and a decree entered against them in favor of the said State of Maryland for the amount which upon a hearing, shall be found to be due by them, respectively—

12 (2) That your orator may have such other and further relief as his case may require—

(3) May it please your Honor to grant unto your orator the writ of subpœna directed to the said D. E. Foote and Company, a corporation, William H. McGee, trading as Wm. H. McGee & Company, J. Langrall & Brother, a corporation, and C. L. Applegarth Company, a corporation, all of said Baltimore City, commanding them to be and appear in this Court at some certain day, to be named therein, and answer the premises and abide by and perform such decree as may be passed therein.

And as in duty bound, etc.,

FREDERICK DALLAM,  
*Solicitor for Plaintiff.*

*General Replication.*

(Filed 23rd September, 1911.)

In the Circuit Court of Baltimore City, September Term, 1911.

D. E. FOOTE & Co. et al.

VS.

CHARLES H. STANLEY, Etc.

The plaintiff- join issue on the matters alleged in answer of the defendant, Charles H. Stanley, Comptroller of the State of Maryland, so far as the same may be taken to deny or avoid the allegations of the bill.

WHITELOCK, DEMING & KEMP,  
*Solicitors for Plaintiff.*



*Answer to Cross-Bill.*

(Filed 27th September, 1911.)

In the Circuit Court of Baltimore City.

CHARLES H. STANLEY, Comptroller, et al.,

vs.

D. E. FOOTE & COMPANY, INC., et al.

To the Honorable Judge of said Court:

13 The answer of D. E. Foote & Company, a corporation, organized under the laws of the State of Delaware, William H. McGee, trading as W. H. McGee & Company, J. Langrall & Brother, a corporation organized under the laws of the State of Maryland, and the C. L. Applegarth Company, a corporation organized under the laws of the State of Maryland, defendants herein, to the Cross-Bill of Complaint of Charles H. Stanley, Comptroller for the State of Maryland, against them in this Honorable Court exhibited.

These defendants answering say:

1. They admit the allegations of the first paragraph of said Cross-Bill of Complaint, but for greater particularity refer to the Bill of Complaint filed by these defendants in this Court against the plaintiff herein.

2. They admit that the plaintiff herein has filed his answer to the Bill of Complaint filed by these defendants, but they deny the other allegations in the second paragraph of said Cross-Bill.

3. Answering the third paragraph of said Cross-Bill, these defendants admit that they purchased certain oysters within the respective periods mentioned in said paragraph, and that the State's count of such sales of oysters is correctly set forth therein (except as to an error of 5000 bushels excess charged against the defendant J. Langrall & Bro. Inc.), but these defendants deny that they are indebted to the State of Maryland for any tax or charge lawfully imposed upon such sales of oysters to these defendants. On the contrary, they are advised and therefore aver that for reasons set forth in the Bill of Complaint filed by these defendants, the statute, upon which the plaintiff in this case relies, is unconstitutional and void. These defendants are further advised and therefore aver that in any event they are fairly and equitably entitled to a credit on account of any taxes which may be lawfully imposed under said statute, equal to the respective amounts paid by these defendants to the plaintiff as set forth in paragraph five of the original Bill of Complaint filed by these defendants.

And having fully answered said Cross-Bill of Complaint, so far as they are advised is necessary, these defendants pray to be hence dismissed with their reasonable costs.

WHITELOCK, DEMING & KEMP,  
*Solicitors for Defendants.*



*General Replication.*

(Filed 27th September, 1911.)

In the Circuit Court of Baltimore City, September Term, 1911.

CHARLES H. STANLEY, Comptroller, Etc.,

VS.

D. E. FOOTE &amp; Co., a Corporation, Etc., et al.

The plaintiff join- issue on the matters alleged in answer of D. E. Foote and Company, a corporation, etc., et al., so far as the same may be taken to deny or avoid the allegation of the bill.

FREDERICK DALLAM,  
*Solicitor for Plaintiff.*

In the Circuit Court of Baltimore City.

D. E. FOOTE &amp; COMPANY et al.

VS.

CHARLES H. STANLEY, Comptroller, et al.

*Agreement of Counsel.*

This case is hereby submitted to the Court for final hearing and for the passage of a decree, on the pleading herein and the facts set forth in the following statements, which are hereby admitted to be true to the same effect in all respect as if duly proven in evidence, it being understood that any legislation of the State of Maryland, relating to the issues raised on matters referred to herein shall be considered in evidence and may be read at any hearing from any of the printed volumes of the Acts of the General Assembly of Maryland, or from the Code of Public General Laws of Maryland. All rights of appeal and of application for writ of error are expressly reserved by the respective parties.

(1) Each of the plaintiffs herein, viz: D. E. Foote & Company, incorporated, W. H. McGee & Company, J. Langrall & Bro., incorporated, and C. L. Applegarth Company, has paid to the

15 State of Maryland the special license tax of \$25 prescribed by Sec. 77 of Art. 72 of the Code of Public General Laws of Maryland up to and including the oyster season of 1910-11, and is regularly assessed for miscellaneous "stock" at its factory in Baltimore City, and has paid State and City taxes annually on such assessment. During the oyster season of 1910-11 (that is from September 1st, 1910 to April 30th, 1911), the said plaintiffs have received and bought at their respective factories in Baltimore City the number of bushels of oysters in the shell as stated in the following table, brought from the oyster beds located within the States of Maryland, Virginia and New Jersey, said oysters having been delivered to the said plaintiffs at their respective factories in vessel loads or part

vessel loads (i. e. less than cargo lots) or in barrels or bags, and in the same condition as shipped and brought from the respective localities where said oysters were caught, viz:

Name of plaintiff.	Number of bushels Maryland oysters.	Number of bushels Virginia oysters.	Number of bushels New Jersey oysters.
D. E. Foote & Co., Inc. . . .	163,850½	81,056	180
W. H. McGee & Co. . . . .	127,213	54,674	10,534
J. Langrall & Bro., Inc. . .	131,893	56,446	.....
C. L. Applegarth Co. . . . .	71,304	36,646	3,404

The above figures are approximately correct.

(2.) The said plaintiffs have paid to the State of Maryland the tax or charge prescribed by Ch. 735 of the Acts of 1910 (since declared unconstitutional) upon the number of bushels of oysters stated in the following table, (being part of the oysters above enumerated) shipped and brought from the oyster grounds of the States of Maryland, Virginia and New Jersey within the time specified, viz:

Name of plaintiff.	Date of purchase of oysters.	Number of bushels purchased.	Amount of tax paid.
D. E. Foote & Co., Inc. . .	Sep. 1–Nov. 5	52,693	1053.86
W. H. McGee & Co. . . . .	Sep. 1–Oct. 22	23,232	464.64
J. Langrall & Bro., Inc. .	Oct. 1–Nov. 5	21,966	439.32
C. L. Applegarth Co. . . .	Sep. 1–Nov. 5	15,022	300.44

16 The above amounts of taxes paid have been, by the Comptroller and upon his warrants, paid into the Treasury of the State of Maryland and to the Treasurer of said State.

(3.) During the fiscal year ending September 30th, 1909, the receipts of taxes on oysters at the rate of one cent per bushel amounted to \$35,632.95. The disbursements for account of salaries of the measurers and inspectors of oysters were \$13,622.00, leaving a balance of excess of \$22,010.95 which was carried to the credit of the Maryland State Oyster Fund. The official report of the Comptroller of the State of Maryland to the General Assembly of Maryland, dated December 24th, 1909, and submitted in accordance with Sec. 9 of Art. 19 of the Code of Public General Laws, covering fiscal year ended September 30th, 1909, says:

#### Oyster Fund.

"The receipts and disbursements on account of this Fund are shown in Statement 'H,' showing a balance on hand at the close of the fiscal year of \$4,795.38, the most gratifying exhibit of this fund for years by reason of largely increased revenues, sufficient indeed to meet all demands without an appropriation from the Treasury. The tax of one cent per bushel on all oysters inspected in this State, as enacted by Chapter 488 of the Acts of 1908, has been sufficient not only to pay the cost of such inspections, but also to carry to this fund the balance or excess of \$22,010.95."

Statement "H" referred to in said report is as follows:

*Statement H.*

Receipts and Disbursements on Account of the Oyster Fund During  
the Fiscal Year Ended September 30, 1909.

Sources.	Amounts.	Aggregates.
Balance to the Credit of the Oyster Fund October 1, 1908.....		\$4,463.29
<i>Receipts.</i>		
From Clerk Circuit Court of Talbot Co. ....	\$1,250.00	
" Clerk Circuit Court of Queen Anne's County.....	380.00	
" Clerk Circuit Court of Kent County..	427.50	
17		
From Sale of gasoline launch.....	\$125.00	
" Dredging Licenses.....	18,989.50	
" Oyster Pines.....	3,542.16	
" Tong and Scrape Licenses.....	10,288.99	
" Oyster Cannermen and Packers' Licenses	3,929.25	
" Fishery Licenses, Chesapeake Bay...	420.26	
" Oyster Measurers' Licenses.....	190.00	
" Purse Net Licenses.....	75.00	
" Excess of General Measurers and In- spectors of Oysters.....	22,010.95	
		<u>61,628.61</u>
Total Receipts.....		\$66,091.90
<i>Disbursements.</i>		
For Salaries .....	\$48,410.09	
" Supplies .....	3,171.27	
" Repairs .....	3,772.16	
" Fuel .....	2,442.96	
" Incidental Expenses.....	3,023.47	
" Expenses at Headquarters.....	476.57	
		<u>61,296.52</u>
Balance to the credit of the Oyster Fund, Sep- tember 30, 1909.....		\$4,795.38

(4.) During the fiscal year ending September 30, 1910, the receipts of taxes on oysters at the rate of one cent per bushel amounted to \$43,671.94. The disbursements for account of salaries of the measurers and inspectors of oysters were \$14,991.00, leaving a balance or excess of \$28,680.94 which was carried to the credit of the Maryland State Oyster Fund. The official report of the Comp-

troller of the State of Maryland to the General Assembly of Maryland, dated December 24th, 1910, and submitted in accordance with Sec. 9 of Art. 19 of the Code of Public General Laws, covering fiscal year ended September 30th, 1910, says:

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## Oyster Fund.

"The revenues to this fund in the whole have remained about the same as last year, aggregating for the fiscal year 1910 \$61,814.32, exclusive of the balance brought down from the previous year, all of which will be fully shown in Statement 'H,' while the expenses of the State Fishery Force amounted to \$66,589.15. The receipts from dredging and tonging licenses show a heavy shrinkage by reason of fewer boats being engaged in the industry, nevertheless the excess tax of one cent per bushel on oysters sold amounted to \$28,680.94, making the fund self-sustaining for the year."

Statement "H" referred to in said report is as follows:

*Statement H.*

Receipts and Disbursements on Account of the Oyster Fund During  
the Fiscal Year Ended September 30, 1910.

Sources.	Amounts.	Aggregates.
Balance to the Credit of the Oyster Fund October 1, 1909.....		\$4,795.38

## Receipts.

From Clerk of the Court of Talbot County..	\$1,250.00
" Clerk of the Court of Queen Anne's County.....	427.50
" Clerk of the Court of Kent County...	427.50
" Sale of Old Sail.....	36.03
" Sale of Old Gasoline Barrel.....	1.00
" Sale of Yawl of the "Daisy Archer"...	70.00
" Dredging Licenses .....	16,252.50
" Oyster Fines.....	1,442.25
" Tong and Scrape Licenses.....	8,518.96
" Oyster Cannermen and Packers' Licenses	3,960.00
" Fishery Licenses, Chesapeake Bay....	477.89
" Oyster Measurers' Licenses.....	194.75

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From Purse Net Licenses.....	\$75.00
Excess of General Measurers and Inspectors of Oysters.....	28,680.94
	<hr/>
	61,814.32
Total Receipts.....	<hr/>
	\$66,609.70

## Disbursements.

For Salaries .....	\$49,461.27	
" Supplies .....	3,143.89	
" Repairs .....	7,143.85	
" Fuel .....	2,600.99	
" Incidental Expenses.....	3,601.21	
" Expenses at Headquarters.....	637.94	
		66,589.15
Balance to the Credit of Oyster Fund, Sep- tember 30, 1910.....		\$20.55

(5.) From October 1st, 1910, to September 18th, 1911, the actual receipt of taxes on oysters at the rate of *two* cents per bushel have been \$50,356.88, of which one-half (or \$25,178.44) was upon receipt thereof by the Comptroller paid into the Treasury to the credit of the "Reshelling Fund," as provided by Chapter 735 of the Acts of 1910. During the same period, and at the rate of *one* cent per bushel, the actual receipts of taxes on oysters have been \$439.14, and the additional amounts claimed to be due at the rate of *one* cent per bushel, from oyster packers who have withheld payment of the tax by reason of pending litigation, are \$13,790.17. During the same period, the disbursements for account of salaries of the measurers and inspectors of oysters have amounted to \$15,093.00. The official report of the Comptroller of the State of Maryland covering the current year has not been prepared, but the following is the Comptroller's statement of receipts and disbursements on account of the "Oyster Fund" from October 1st, 1910 to September 18th, 1911:

## Statement.

Showing Receipts and Disbursements on Account of the Oyster Fund from October 1, 1910, to September 18, 1911.

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Sources.	Amounts.	Aggregates.
Balance to the credit of the Oyster Fund October 1, 1910.....		\$20.55

## Receipts.

By Chapter 435 of the Acts of 1910.....	\$10,000.00
From Clerk of the Court of Talbot County..	1,255.00
" Clerk of the Court of Kent County...	427.50
" Clerk of the Court of Queen Anne's County.....	427.50
" Dredging Licenses.....	19,469.85
" Oyster Fines.....	715.45
" Tong and Scrape Licenses.....	10,364.15
" Oyster Cannery and Packers' Licenses	4,464.75
" Fishery Licenses, Chesapeake Bay....	461.95
" Oyster Measurers' Licenses.....	204.25



"	Purse Net Licenses.....	200.00	
"	General Measurers and Inspectors of Oysters—		
	Receipts .....	\$25,403.20	
	Salaries .....	15,093.00	
		<u>10,310.20</u>	
			<u>58,300.60</u>
	Total Receipts.....		\$58,321.15

## Disbursements.

For Salaries .....	\$40,291.42	
" Supplies .....	2,829.31	
" Repairs .....	9,102.98	
" Fuel .....	2,405.51	
" Incidentals .....	2,849.70	
" Expenses at Headquarters.....	536.58	
	<u>58,015.50</u>	

Balance to credit of Fund, September 18,  
1911..... \$305.65

(6.) The "Oyster Fund" referred to above is a special fund provided for by Sec. 30 of Art. 72 of the Maryland Code. The disbursement- of this fund have been made for the purposes set forth in said section. The terms "salaries," "supplies," "repair," &c., used  
21 by the Comptroller in the foregoing statement allude to expenditures in connection with the State Fishery Force, and are exclusive of and have no reference to the salaries of the measurers and inspectors of oysters. It is admitted that the figures set forth in the above reports and statements of the Comptroller are correct.

(7.) The vessels of the State Fishery Force have been and are operated for the purpose of enforcing all the oyster laws of the State of Maryland, and are used within the State of Maryland for the purpose of seeing that all the provisions of Article 72 are properly enforced.

WHITELOCK, DEMING & KEMP,  
*Solicitors for Plaintiffs.*  
FREDERICK DALLAM,  
*Solicitor for Defendant.*

*Opinion.*

(Fd. 29th September, 1911.)

In the Circuit Court of Baltimore City.

Before Judge Heuisler.

D. E. FOOTE &amp; COMPANY et al.

VS.

CHARLES H. STANLEY, Comptroller.

*Opinion (Oral.)*

BALTIMORE, September 29, 1911.

HEUISLER, J.:

In the opinion of the Court of Appeals of Maryland, filed on the 23rd of June, 1911, and reported in the Daily Record of June 29, 1911, in the case of Foote and others vs. Clagett, Comptroller, and others, Chapter 735 of the Acts of 1910 of the General Assembly of Maryland, was held to be void, as being in violation of Article 1, Section 8 of the Constitution of the United States, which vests in Congress exclusive power to regulate commerce between the States.

22 In the bill filed averring said Act to be unconstitutional and void, other objections were urged as stated in the above mentioned petition, but the Court held that in "view of the conclusive effect of one objection to the validity of this law which we have considered, we will not prolong this opinion by considering any of the other objections urged." The Court further stated that the conclusion reached by it was the result of the controlling effect of the case of the State against the Cumberland & Pennsylvania Railroad Company, reported in 40 Md., at page 44.

On the 13th of September, 1911, another Bill of Complaint was filed in the Circuit Court of Baltimore City by D. E. Foote & Company and others against Charles H. Stanley, Comptroller of the State of Maryland, to restrain the collection by him of a tax, or charge, imposed and prescribed by Chapter 413 of the Acts of the General Assembly of Maryland passed at the session of 1910. The tax or charge referred to is contained in Section 69 of said Chapter 413, and is in the following words: "A charge of one cent per bushel is hereby levied to help defray the expense of such inspection, and the other expenses of the State Fisheries Board." The tax of one cent per bushel levied as above was also made, or charged, under the other provisions of this Section 69 on oysters sold by less than the cargo, &c. The plaintiff alleged and averred that the respective charges, or taxes, prescribed by said Act are illegal, and that the act itself is unconstitutional and void because:

"a. Said Act is repugnant to Article 1, Section 8, of the Constitution of the United States which vests in Congress exclusive power to



regulate commerce with foreign nations, and among the several States, and with the Indian tribes. In that the charges or taxes therein prescribed interfere with the freedom of commerce among the several States, and the exclusive power of Congress over the same.

"b. Because the said Act is repugnant to Article 1, Section 10, of the Constitution of the United States which provides that 'No State shall, without the consent of the Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws,' in that said Act provides that the

23 charges or taxes therein prescribed are, 'to help defray the expenses of such inspection and the other expenses of the State Fishery Force,' and that said charges or taxes are used for purposes other than the execution of the inspection law of the State of Maryland, and that the charges or taxes therein prescribed are far in excess of what is needed for the execution of the inspection laws of said State.

"c. Because said Act is repugnant to Article 15 of the Bill of Rights of the Constitution of the State of Maryland, which provides that, 'every person in the State or persons holding property therein ought to contribute his proportion of public taxes for the support of the Government according to his actual worth in real or personal property; yet fines, duties or taxes may properly and justly be imposed or laid with a political view for the good government and benefit of the community,' in that said Act imposes a direct tax upon property and not upon the owner thereof, and that quite irrespective of the value of said property, the said tax is not 'laid with a political view for the good government and benefit of the community.'

"d. Because said Act is in other respects repugnant to the Constitution of the United States and the Constitution of the State of Maryland."

These are the allegations contained in the Bill asserting the invalidity and unconstitutionality of the Act under examination. I am of opinion that for the purposes of this case, keeping in mind comments of the Court in the first appeal, that the second objection urged against the law that it is repugnant to Article 1, Section 10 of the Constitution of the United States, is the only one necessary to be considered, for it is manifest that an inspection measure was contemplated in the enactment of the statute. The Constitution of the United States provides that no State shall, without the consent of Congress, lay any impost or duties on imports or exports except what may be absolutely necessary for executing its inspection law. This paragraph of the Constitution expressly reserves the right of the State to pass inspection laws, and if this law complained of is really an inspection law it is valid and binding within the limitations of the Constitutional provision.

24 Mr. Justice Bradley, in Neilson against Gorza reported in 2 Woods, 287, Federal Cases No. 10,091, and to which case reference is made in the opinion of Chief Justice Fuller in the case of the Patapeco Guano Company vs. North Carolina, reported in 171 U. S., page 355, says: "The right to make inspection laws is not granted to Congress, but is reserved to the State; but it is

subject to the paramount right of Congress to regulate commerce with foreign nations, and among the several States; and if any State, as a means of carrying out and executing its inspection laws, imposes any duties or imposts on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws. How the question whether a duty is excessive or not is to be decided may be doubtful. As that question is passed upon by the State Legislature, when the duty is imposed, it would hardly be seemly to submit it to the consideration of a jury in every case that arises. This might give rise to great diversity of judgment, the result of which would be to make the law constitutional one day, and in one case, and unconstitutional another day, and in another case." And Mr. Justice Day in the case of *New Mexico ex rel., E. J. McLean & Company vs. The Denver & Rio Grande Railroad Company*, 203 U. S., page 55, relative to the same inquiry says: "It is further urged that this law is invalid because it imposes an unreasonable fee for the inspection, which goes into the treasury of the Sanitary Board, and the allegations of the writ tend to show that an inspector might make a considerable sum in excess of day's wages in the work of inspecting hides under the provisions of this Act. The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the Legislature to fix the amount and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law."

It does not seem to be the approved law that the reasonableness of the tax as to amount is a judicial inquiry. Our Court of Appeals in the Foote case in the use of the words, "The Courts are to judge of the reasonableness of the tax for that purpose," in my opinion does not mean to usurp the privileges of the legislative department of the Government unless they find, as they did in the first appeal of this case, an act which, "upon its face discloses the fact that the charge of 2 cents per bushel is not necessary for the execution of the law, since it segregates one-half the charge, and applies it to reselling the oyster bottoms of the State, thus enriching the

25 resources of the State by a tax upon Interstate Commerce.

The title of this act, 'to increase the productivity of the natural oyster bars or beds of this State,' read in connection with the application of one-half the tax just mentioned, demonstrates that it is, in fact, a revenue measure under the guise of the inspection law."

We must find, as I read the law, upon the face of the act under consideration, or in the application of its revenues an unreasonableness in the tax for the purposes of the act, otherwise the Court should leave to the sound discretion of the Legislature, which, of course should be honestly exercised, the question as to what occupation shall be licensed, and as to what rate shall be charged, etc., so long as the laws do not manifestly conflict with some provision of the Constitution of the United States or of the State. That is a quotation from *State against Applegarth*, 31 Md., page 303.

What do we find upon the face of the act? "A charge of one cent per bushel is hereby levied to help defray the expenses of such in-

specification and the other expenses of the State Fishery Force." In the first appeal of this case the Court of Appeals had these identical words before them in the body of Section 69 of Chapter 735, as follows: "A charge of two cents per bushel is hereby levied, one-half of which is to help defray the expenses of such inspection and the other expenses of the State Fishery Force, and the other half of which is to be expended in reselling and otherwise cultivating and improving the natural oyster beds and bars in the waters of the State." And the Court appeared to have no cause of complaint against them at that time, and I am therefore justified in attempting to gather from an examination of the various provisions of Article 72 how far the expenses of the State Fishery Force, if at all, can be considered as expenses of such inspection. Section 69 itself, among other things, makes it the duty of the Commander of the State Fishery Force, first, at the commencement of or during the oyster season in each year to appoint special inspectors; second, to station said inspectors at such places as in the judgment of the Commander of the State Fishery Force their services may be needed; third, said special inspector shall inspect all oysters in the district to which he is assigned and issue in triplicate certificates of such inspection to the purchasers, the seller and the general measurer and inspector of the district where such inspection occurred; fourth, inspectors are required to visit the places where less than cargoes of oysters are sold and return certificates as to the facts of such visit to the general measurer or inspector; fifth, all the said special inspectors may be removed at any time by the Commander for neglect or malfeasance in office, and said Commander shall report to the Governor any neglect of a general measurer and inspector. These certificates required to be given by the special inspectors shall be furnished in book form to them by the Commander of the State Fishery Force, and in addition to these duties specially detailed in Section 69, Section 71 gives the duties of the general measurers and inspectors to supervise subordinates to see that inspection laws are enforced, and other duties of a similar character directly and specifically noted as the duties of inspection.

It might at this point be both interesting and instructive also to make reference and adopt, for the purposes of this opinion, the language of the counsel for the appellants as found in their brief on page 5 as follows:

"Chapter 735 is entitled, 'An Act to Increase the Productivity of the Natural Oyster Beds and Bars of This State.' It increases the charge on oysters to two cents per bushel, four cents per bag and six cents per barrel. The following significant change in the expenditure of the revenue derived therefrom is then made: 'One-half of which is to help defray the expense of such inspection and the other expenses of the State Fishery Force, and the other half of which is to be expended in reselling and otherwise cultivating and improving the natural oyster beds and bars in the waters of the State.' A distinct departure is here observed. The law no longer relates exclusively to inspection of oysters and the collection of a tax to defray the expenses thereof, but for the first time an effort is made to engraft upon the law a

revenue measure to provide funds for reshellings and cultivating the Maryland oyster beds."

The words of this particular part of the act should be read in conjunction with all the provisions of the whole act in order that an intelligent consideration of the words may follow, (State against Popp, 45 Md., 432) and if possible, the act must be read to the conclusion with the words, "and the other expenses of the State Fishery,"

27 which do not mean a diversion of the fund, if it can be done, as all the intendments move with the law, and the law of the State must be sustained if it be possible to do so. (Foote against the Comptroller, reported on the 29th of June.)

The scope of the inspection as provided for in this law and the expense thereof, in my judgment, could no more be limited than could the police power of the State be limited. The scheme of inspection as detailed in all sections of the oyster law is entwined and interwoven in the general operation of the oyster law as administered by the State Fishery Force, and the Court should not, unless for grave and weighty reasons, disturb that relation. If I understand the meaning of the decision in the first appeal of this case, it was because of the statement to which I have referred in the brief of the appellants, and it was that statement in the brief of the appellants, that gave birth to the comment of the Court, that no State could, under the guise of an inspection law, impose a revenue measure upon the State. But when it is understood and recalled that that distinction in the law was made, and the very verbiage of the act under consideration was submitted to the Court under the first appeal; when we consider the fact, if the words "and the other expenses of the State Fishery Force" were not in the act at all and that the tax when collected was to be used entirely for inspection purposes, that the Supreme Court of the United States has stated that if that tax was excessive it was not for judicial inquiry, but for legislative remedy. When we understand that if it had stopped at the end of the word "inspection," if the application of the tax had stopped at the end of the word "inspection," the only remedy to these plaintiffs would be an appeal to the Legislature. The case narrows itself down to that one point as to whether the words "the other expenses of the State Fishery Force" ought to, in the first instance of the attack upon the law, be read into it as a part of the necessary expense. If the State Fishery Commander was not paid there would be no inspectors; if the revenues of this particular tax were not turned over for the purposes of supporting the department over which the Commander of the State Fishery presides there would be no inspector appointed, no measurer and general inspector appointed, nobody to go to the various places where inspection is permitted and see that the law was properly enforced, and I cannot escape the conclusion that I must read into the act the very words which the Court of Appeals left in the old

28 Section 69 of Chapter 735 when they had that under discussion. The Court of Appeals made a clear and distinct split of the law, and while they reprehended the latter part, which

is italicized in the appellants' brief, and referred to in the conclusion of the Court's opinion, while they reprehended the application of the extra cent of tax to the reselling of the oyster beds and increasing the productivity of the oyster beds, they absolutely must have meant to say, and I so hold, that the original tax for the purpose of inspection, and the expenses of the State Fishery Force, was a proper imposition, or a proper tax for a proper purpose, and that the word "inspection" was intended to comprehensively include the expense of the State Fishery Force as an absolutely necessary portion of the system by which the inspection could be properly and completely performed.

Bearing in mind that consideration that I think the Court in the first appeal has given to those words, bearing in mind the duty which is imposed upon me to construe the act in all its parts to see whether it does mean to be an inspection law, and bearing in mind the gracious endorsement in the first appeal by the Court of Appeals that I was right in attempting to uphold the law of the State, I again perform the same duty and declare the law to be valid, binding, from my observation and inspection of it, and will dismiss the Bill of Complaint, and in order that the matter may, without further inconvenience or delay to the plaintiff, be disposed of upon proper appeal, I will also dismiss the Cross-Bill with costs, and without prejudice.

CHAS. W. HEUISLER.

*Decree.*

(Filed 29th September, 1911.)

In the Circuit Court of Baltimore City.

D. E. FOOTE AND COMPANY, a Corporation, Etc., et al.

VS.

CHARLES H. STANLEY, Comptroller of the State of Maryland.

To the Honorable the Judge of said Court:

29 This cause having been submitted for final decree, and counsel for the parties having been heard and all of the pleadings and proceedings having been read and considered, it is this 29th day of September, 1911, by the Circuit Court of Baltimore City, adjudged, ordered and decreed that the original Bill of Complaint herein be dismissed with costs and that the Cross-Bill be dismissed without prejudice.

CHAS. W. HEUISLER.



*Order for Appeal.*

(Filed 29th September, 1911.)

In the Circuit Court of Baltimore City.

D. E. FOOTE &amp; Co. et al.

VS.

CHARLES H. STANLEY, Comptroller, et al.

**Mr. CLERK:**

Please enter an appeal to the Court of Appeals of Maryland on behalf of all the plaintiffs herein from the decree in this case, dated September 29th, 1911.

WHITELOCK, DEMING & KEMP,  
*Solicitors for Plaintiffs.*

Which said appeal being by the Court here also granted, it is thereupon ordered by the Court here, that a Transcript of the Record Proceedings in the cause aforesaid be transmitted to the Court of Appeals of Maryland, under the rules, and the same is transmitted accordingly.

Test:

WM. M. CARSON, *Clerk.*

Cost of Record, \$36.00.

30 In testimony, that the foregoing is truly taken from the Record and Proceedings of the Circuit Court of Baltimore City, in the therein entitled cause.

I hereunto set my hand and affix the seal of the Circuit Court of Baltimore City aforesaid, this 29th day of September A. D., 1911.

[SEAL.]

WM. M. CARSON,

*Clerk of the Circuit Court of Baltimore City.*Endorsed on back: Filed September 30<sup>th</sup>, 1911.31 *Opinion of the Court of Appeals of Maryland.*

The bill of complaint in this case was filed by the appellants in the Circuit Court of Baltimore City to restrain Charles H. Stanley, Comptroller of the State, from collecting a charge of one cent per bushel upon all oysters unloaded from vessels at the place where oysters are to be no further shipped in vessels, which charge is imposed by section 69 of Art. 72 of the Code of Public General Laws of Maryland as re-enacted by Chapter 413 of 1910. This charge is levied "to help defray the expenses" of the system of inspection provided by that article, of all oysters taken from the waters of the State for sale, and sold by commission merchants or others, and "the other expenses of the State Fishery Force," upon which the duty of making such inspection is laid by that article. During the period for which the charges were made, the collection of which is here

sought to be restrained, the appellants have received at their several places of business 494,260 bushels of Maryland oysters, and 243,935 bushels of Virginia and New Jersey oysters.

In the case of Foote & Co. vs. Wm. B. Clagett, Comptroller of the State, in which the opinion was filed June 23rd 1911, and reported in the Daily Record of June 29th 1911, a similar bill was filed to restrain the collection of a charge of two cents per bushel upon all oysters unloaded from vessels as above stated, and sold by commission merchants or others, which charge was imposed by sec. 69 of Chapter 735 of 1910. Under that Act, one half of that

charge was to help defray the expenses of the same inspection provided for by sec. 69 of Chapter 413, of 1910, and the other half was to be expended in reselling, cultivating and improving the natural oyster beds and bars in the waters of the State. Sec. 69 of Chapter 413, of 1910 is identical in language with sec. 69 of Chapter 735 of 1910, except that in the latter the charge was two cents per bushel—only one half of which was for expense of inspection, and the other half was required to be expended in developing and cultivating the natural oyster bars and beds of the State; while under sec. 69 of Chapter 413 of 1910, the charge was only one cent per bushel, the whole of which was to help defray the expense of inspection, and the other expenses of the State Fishery Force through whose agency the inspection is required to be made. Section 69 of Chapter 735 of 1910 was set out in full in the opinion in the former case, and it will be unnecessary therefore to set out here sec. 69 of Chapter 413 of 1910. In the former case, sec. 69 of Chapter 735 of 1910 was held void solely upon the ground that in addition to the charge for inspection, it also imposed a further charge for 'reselling and improving the oyster bars and beds of the State, thus making the law a revenue measure, and bringing that case within the authority of State vs. C. & P. R. R. Co., 40th Md. 22, in which the Act imposing a tonnage tax upon all coal mined in this State and transported to any place in this State or elsewhere, was held void as a restriction upon interstate commerce. None of the other grounds upon which the validity of sec. 69 of Chapter 735 was assailed, were considered in that case, and it is virtually conceded by both parties to this case that as the result of the decision in the former case, Chapter 413 of 1910 was left in force until also declared unconstitutional and void.

Three of the other grounds alleged in the former case against Chapter 735 are renewed here as against Chapter 413, and they are these.

(a) Because it is repugnant to Art. 1, sec. 8 of the Constitution of the United States which vests the Congress of the United States with exclusive power to regulate commerce with foreign nations and among the several States.

(b) Because it is repugnant to Art. 1, sec. 10 of the Constitution of the United States which forbids any State to lay any duties on imports or exports except what may be absolutely necessary for executing its inspection laws; "in that said charge is used for pur-



poses other than the execution of the inspection law of Maryland, and that the charge therein prescribed is far in excess of what is needed for the execution of the inspection laws of said State."

(c) "Because it is repugnant to Art. 15 of the Bill of Rights of the Constitution of the State of Maryland which provides 'that every person in the State, or persons holding property therein, ought to contribute his proportion of public taxes for the support of the Government according to his actual worth in real or personal property; yet fines, duties or taxes, may properly or justly be imposed or laid, with a political view for the good government and benefit of the community,' in that said Act imposes a direct tax upon property, and not upon the owner thereof, and that, quite irrespective of the value of said property, the said tax is not laid with  
34 a political view for the good government and benefit of the community."

The Circuit Court held the law to be constitutional and valid, and dismissed the bill, and this appeal is from that decree.

We shall consider these three objections of the appellants to the constitutionality of this law in the following order, somewhat different from that in which they are stated in the bill;

1. That based upon Art. 1, sec. 10 of the Constitution of the United States. It is quite clear, in our opinion, that this section of the Constitution can have no application to this case. There is no allegation in the bill, nor in the agreed statement of facts filed in the case, that these appellants, or any of them, are dealers in oysters brought from any foreign country, or that any of the oysters for the inspection of which the charge is imposed in this case, were brought from any foreign country. On the contrary the only allegation of the bill as to the places from which the oysters in which they deal are brought, is that they are brought "from the oyster beds located within the States of Maryland, Virginia, and New Jersey," respectively, and the agreed statement of facts shows that all the oysters in respect to which this charge is laid, came from the three States above named, and in the proportions stated in the agreed statement of facts.

In *Woodruff vs. Parham*, 8th Wall. 123, Mr. Justice Miller, critically considered the language of the Constitution of the United States, with reference to the meaning of the correlative terms "import," "imports" and "exports," as used therein, and the history of its formation and adoption, and it was there determined,  
35 without dissent from any member of the Court, that no intention existed to prohibit by this clause, the right of one State to tax articles brought into it from another, and that therefore the constitutional provision against taxing imports by the States, does not extend to articles brought from another State. This conclusion was reached, as declared by the Court, without questioning the authority, or departing from the principles, laid down in *Brown vs. Maryland*, 12th Wheaton 1, which case Mr. Justice Miller says was well decided upon another ground there taken; namely that the tax in that case "was a regulation of commerce, a tax imposed upon the transportation of goods from one State to

another over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall vs. Nevada*, 6th Wall. 35, and with the authority of Congress to regulate commerce among the States."

That case has been approved and followed in later cases, notably in *Pittsburg & Southern Coal Co. vs. Louisiana*, 156th U. S. 590, *Patapsco Guano Co. vs. Board of Agriculture*, 171 U. S. 345, and is now the settled doctrine of the Supreme Court. *New Mexico vs. Denver & Rio Grande R. R. Co.*, 203 U. S. 38.

If the law now before us is repugnant to the Constitution of the United States, such repugnancy must be found in some other clause of the Constitution. It may be observed before passing from the consideration of this clause of the Constitution, that even as to imports from foreign countries, the right of the States to lay such  
 36 imports or duties as are absolutely necessary for executing their inspection laws, is expressly declared in that clause, thus recognizing by clear implication the right of the States to pass inspection laws as distinguished from revenue measures.

(2) We will now turn to sec. 8 of Art. 1 of the Constitution of the United States which vests Congress with exclusive power "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes," and which is the only other clause of that Constitution to which this law is alleged to be repugnant.

In *Robbins vs. Taxing District of Shelby County*, 120 U. S. 489, it was said that the power to regulate commerce between the States was exclusive "and that any regulation of the subject by the States, except in matters of local concern only, as hereinafter mentioned, is repugnant to such freedom. \* \* \* and that the only way in which commerce between the States can be legitimately affected by State laws, is when by virtue of its police power and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property, or when it does those things which may otherwise incidentally affect commerce; such as \* \* \* the passage of inspection laws to secure the due quality and measure of products and commodities, &c."; and that case has been since consistently and unhesitatingly followed in the Supreme Court. Mr. Justice Miller in the *Slaughter House Cases*, 16 Wall. 36, declared the police power to be incapable of exact definition or limitation, and "that all persons and property within the State, in the  
 37 exercise of that power" are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this, no question ever was, or upon acknowledged general principles, ever can be made so far as natural persons are concerned." The only question therefore upon this branch of the case is whether this law is really an inspection law, or a revenue law in disguise.

In *Pittsburg & Southern Coal Co. vs. La.*, 156 U. S. 590, an Act of that State providing for two gaugers of coal and coke boats, and requiring the measurement by them of all coal or coke brought in

the State on boats or barges, and fixing a charge of \$10. for each boat, and \$5.00 for each barge, to be paid by the seller, was held not to be a regulation of commerce, "but was properly to be regarded as a part of those innumerable police regulations which every State may enact for the convenience and comfort of its inhabitants in the conduct of their business."

In *Patapsco Guano Co. vs. Board of Agriculture of North Carolina*, 171 U. S. 345, an Act of that State imposed a charge of twenty five cents per ton for inspection of fertilizers, to be paid before delivery to agents, dealers or consumers.

The appellant sought to enjoin the collection of this charge on the ground that the law was in violation of sec. 8, and also of sec. 10 of Art. 1, of the Constitution of the United States. The Circuit Court dismissed the bill, and on appeal the Supreme Court affirmed the decision.

The appellants contended, as the appellants in the present case contend, that the charge required to be paid was so excessive  
38 that the Act could not be sustained as a legitimate inspection law, or as a valid exercise of the police power.

In that case Chief Justice Fuller, speaking of the essential character of inspection laws said: "Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a State, \* \* \* Whenever inspection laws act on the subject before it becomes an article of commerce, they are confessedly valid, and also when, although operating on articles brought from one State into another, they provide for inspection in the exercise of that power of self protection commonly called the police power. No doubt can be entertained of this where the inspection is manifestly intended and calculated in good faith to protect the public health, the public morals, or the public safety, and it has now been determined that this is so, if the object of inspection is the prevention of imposition upon the public generally, \* \* \* or to protect the citizens from being cheated generally;" citing *Plumley vs. Massachusetts*, 155th U. S. 461, and *Schollenberger vs. Pennsylvania*, 171 U. S. 1.

In *New Mexico vs. Denver and Rio Grande R. R. Co.* 203 U. S. 38, the same view is expressed as to the ordinary object and scope of inspection laws, but the Court proceeded to say "We see no  
39 reason why an inspection law which has for its purpose the protection of the community against fraud and the promotion of the welfare of the people cannot be passed in the exercise of the police power, when the legislation tends to subserve the purpose in view." The Act there in question prohibited the receipt by common carriers for transportation beyond the limits of the territory, of any hides which did not bear the evidence of inspection required by Act of the territory, and the Court added to what we

have quoted above, the following; "The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the people of the territory are interested, seems to us an obviously rightful exercise of this power." It will be seen later that that case bears a special analogy to the case now before us.

The appellants in the present case have earnestly contended that the charge imposed by the law is excessive in fact, because it appears from the statements of receipts and disbursements of the Oyster Fund contained in the agreed statement of facts that the charge is, much more than sufficient to pay the mere salaries of the special inspectors provided for by sec. 69 of Chapter 413 of 1910, Art. 72 of the Code, and that the Court in the previous case of *Foot & Co. vs. Claggett*, *supra*, said that "the Courts are to judge of the reasonableness of the tax."

When that case was before us the law we were then considering imposed a charge of two cents per bushel, one half of which only was applicable to inspection, and the other half was applied to increasing the productivity of the oyster beds of the State. It thus showed upon its face that it was in fact, to the extent of one half the charge, a revenue measure, and that the whole charge was for that reason both unreasonable and illegal. In that case therefore, we were warranted in holding that the Court should judge of the reasonableness of that charge, but the language may be conceded to be too broad when applied to a case like the present where the reasonableness of the tax as to the amount merely, is involved.

In *Turner vs. Maryland*, 107 U. S. 38, Justice Blatchford, following the suggestion of Justice Bradley in *Neilson vs. Garza*, 2 Woods 87, said "it may be doubtful whether it is not exclusively the province of Congress, and not at all that of a Court, to decide whether a charge or duty under an inspection law is, or is not, excessive", but the Court did not determine the doubt.

In *Patapsco Guano Co. vs. Board of Agriculture*, *supra*, the Court quotes at length from *Neilson vs. Garza*, *supra*, in which Justice Bradley said "it seems to me that Congress is the proper tribunal to decide the question whether a charge or duty is or is not excessive \* \* \*. If therefore the law is really an inspection law the duty must stand until Congress shall see fit to alter it", and thus he, apparently, adopts Justice Bradley's view, though he had just previously said;

"It does not appear to us, that evidence tending to show that money collected from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of this Act. If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the Legislature would moderate the charge. But treating the question whether twenty five cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question, we are satisfied that comparing the receipts from this charge with the necessary ex-



penses such as cost of analyses, salaries of inspectors, cost of tags, express charges, miscellaneous expenses of the department in this connection, and so forth, we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected as to justify the imputation of bad faith and change the character of the Act."

In *New Mexico vs. Denver and Rio Grande R. R. Co.*, supra, Justice Day flatly says "the law being otherwise valid, the amount of the inspection fee is not a judicial question. It rests with the Legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law".

It would seem from these citations that this matter is still in an atmosphere of uncertainty i. e.; whether the Courts may consider the reasonableness of the charge; whether it must stand until the presumption that the Legislature will moderate the charge is dis-  
42 appointed, or whether it must stand until Congress shall see fit to alter it.

If the question is not a judicial question, there is no need of prolonging the consideration of this branch of the case, since the charge must stand until it is altered, either by the Legislature, or by Congress.

If we follow the example of Chief Justice Fuller in *Patapsco Guano Co. vs. Board of Agriculture*, supra, and treat it as a judicial question, we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected, as to justify the imputation of bad faith, and change the character of the Act.

Section 69 is not an independent, isolated enactment, but a component part of a comprehensive system of law embodied in Art. 72 of the Code of Public General Laws, Title Oysters, and containing 82 sections. Each section therefore must be read in connection with, and construed in reference to, all other sections. *State vs. Popp*, 45 Md. 438. Even a casual examination of that article shows that an elaborate system of inspection runs through the whole law; that its enforcement is an inseparable part of the duty of the State Fishery Force, and that the expense of such inspection is a component part of all the expenses of the State Fishery Force.

In addition to the twenty special inspectors provided for by sec. 69, sec. 68 provides for sixteen general measurers and inspectors

for certain designated places, to be appointed by the Governor.  
43 Oysters are sold not only at the packing houses throughout the State, but also upon the various waters of the State, to what are called "buy boats", and often as seed oysters for transportation beyond the State. To such buyers, the young and unmerchantable oysters are as desirable, if not more so, than the merchantable oysters, and the State Fishery Force is required to see to the inspection of oysters sold to "buy boats" as well as those sold at the packing houses.

Secs. 7 to 14, inclusive, relate to the culling out of small oysters, and require all measurers and inspectors, and all other officers of the State Fishery Force to supervise the operation of the whole article,

and diligently to aid in the enforcement of all its provisions. Culling can only be enforced by inspection. Without it, the young oysters necessary for the preservation of the future food supply afforded by the oyster beds of the State, must soon be destroyed, and the people of the State will be deprived of this inestimable provision of nature, and the thousands who are engaged in that industry will be deprived of a valuable occupation. It is impossible to estimate accurately, in advance, the cost of this necessary inspection. In one season the charge imposed may produce a surplus, while the next season may result in a deficiency which will absorb the surplus of the preceding season or seasons.

But enough has been said to show that the expense of inspection mentioned in sec. 69 cannot be separated from the wider inspection provided by other sections, or from the general expenses of the State Fishery Force which is charged with the whole duty of inspection, and if the question can be regarded as a judicial one, we have no hesitation in holding that the charge imposed is not excessive for the purposes of inspection. The fact that the proceeds of this charge go into the general oyster fund cannot affect the validity of the law. In *State vs. Applegarth*, 81st Md. 304, Judge Boyd, said, "if the State has the right to impose the license tax, as we hold it has, it can certainly determine what shall be done with the money, as long as no unlawful use is made of it." And the same was held in *Patapsco Guano Co. vs. Board of Agriculture*, supra, in the passage already cited from that decision.

3. The contention that the charge is a direct tax upon property and for that reason repugnant to Art. 15 of our Bill of Rights cannot be sustained.

In 2nd *Cooley on Taxation*, p. 1148, it is said, "Inspection fees are not taxes, but are to be referred to the police power". An inspection charge laid in the honest exercise of the police power, is essentially a charge laid "with a political view for the good government and benefit of the community", and is within the very terms of Art. 15 of the Bill of Rights. The text of Judge Cooley is supported by the adjudged cases. *Charleston vs. Rogers*, 2nd McCord 495, *O'Malley vs. Freeport*, 96 Pa. St. 24, *Western Union Tel. Co. vs. Phil.* 148 Pa. St. 117.

The claim of the appellants to set off, or recoup, against the amount claimed by the State in this case, the excess payment made by them in the former case, cannot be allowed, not being provided for by any statute. To allow such a claim would infringe upon the immunity of the State from suit in its own Courts. "It must be presented to another department of the Government, the Legislature". *State vs. B. & O. R. R.* 34th Md. 374.

For the reasons stated the decree of the learned judge of the Circuit Court will be affirmed.

Decree affirmed, the appellants to pay the costs above and below.

Filed November 17th, 1911.

(Endorsed on back:) Court of Appeals of Maryland, October Term, 1911. D. E. Foote & Company, a corporation,

duly incorporated under the Laws of the State of Delaware, et al. vs. Charles H. Stanley, Comptroller of the State of Maryland. Judge Pearce delivered the opinion of the Court.

(Endorsed:) Filed November 17th, 1911.

47 *Decree of the Court of Appeals of Maryland.*

Court of Appeals of Maryland, October Term, 1911.

D. E. FOOTE & COMPANY, a Corporation Duly Incorporated under the Laws of the State of Delaware, et al.,

VS.

CHARLES H. STANLEY, Comptroller of the State of Maryland.

The Appeal in this case, standing ready for hearing, was argued by Counsel for the respective parties, and the proceedings have since been considered by the Court.

It is thereupon, this Seventeenth day of November 1911, by the Court of Appeals of Maryland, and by the authority thereof, adjudged and ordered that the decree of the Circuit Court of Baltimore City made in this cause on the 29th day of September, 1911, be and the same is hereby affirmed, the appellant to pay the costs above and below.

A. HUNTER BOYD.  
JAMES A. PEARCE.  
N. CHARLES BURKE.  
WM. H. THOMAS.  
JNO. R. PATTISON.  
HAMMOND URNER.  
HENRY STOCKBRIDGE.

(Endorsed:) Filed November 17, 1911.

48 Whereupon the following judgment was entered, to wit:  
1911 November 17th Decree affirmed, the appellant to pay the costs above and below.

OP. PEARCE, J.

*Petition for Writ of Error.*

In the Court of Appeals of Maryland.

D. E. FOOTE & COMPANY, INC., a Corporation, et als.,

VS.

CHARLES H. STANLEY, Comptroller of the State of Maryland.

To the Honorable A. Hunter Boyd, Chief Judge of the Court of Appeals of the State of Maryland:

The petition of D. E. Foote & Company, Inc., a corporation, William H. McGee, trading as William H. McGee & Company, J. Lang



all & Brother, Inc., a corporation, and The C. L. Applegarth Company, a corporation, the plaintiffs in the Court below and the appellants in the Court of Appeals of Maryland, respectfully shows:

That there is error in the record of proceedings in this cause in the Court of Appeals of Maryland, which is the highest Court of law and Equity of the State of Maryland in which a decision can be had in this controversy—in that the said Court has, on November 17th, 1911, rendered a decision affirming the decree of the Circuit Court of Baltimore City which dismissed the bill of complaint filed in said Circuit Court of Baltimore City by these appellants; and they respectfully show that in the decision and decree the error in which is herein complained of, there was drawn in question the validity of a Statute of the State of Maryland under the Constitution of the United States, and the said decision and decree are in favor of the validity of said Statute; contrary to their contention; and that by the bill of complaint and other proceedings in the cause a right, privilege and immunity were specially set up and claimed by the said plaintiff and appellants under the Constitution of the United States, and the said decision and decree in this Court are against such right, privilege and immunity; all of which appears in the record and proceedings in this suit, whereby manifest error has happened to the great damage of the appellants; as shown more in detail by the assignment of errors which is filed with this petition.

Wherefore, the said appellants, D. E. Foote & Company, Inc., a corporation, William H. McGee, trading as William H. McGee & Company, J. Langrall & Brother, Inc., a corporation, and The C. L. Applegarth Company, a corporation, by their solicitors, George Whitelock and W. Thomas Kemp, pray for an allowance of a writ of error and such other process as may cause the said error to be corrected by the Supreme Court of the United States.

And as in duty, &c.

GEO. WHITELOCK,  
W. THOMAS KEMP,  
*Solicitors for Petitioners and Appellants.*

(Endorsed:) Filed December 22nd, 1911.

50

*Order of Court Allowing Writ of Error.*

In the Court of Appeals of Maryland.

D. E. FOOTE & COMPANY, INC., a Corporation, et al.,

vs.

CHARLES H. STANLEY, Comptroller of the State of Maryland.

In this cause application having been made to me the undersigned A. Hunter Boyd, Chief Judge of the Court of Appeals of the State of Maryland, that being the highest Court of record in this State in which said cause can be heard, for the allowance of a writ of error to remove said cause to the Supreme Court of the United States for

review in accordance with the Constitution and laws of the United States and rules of practice of the Supreme Court of the United States, and for fixing and approving the bond on the removal of the said cause to the Supreme Court of the United States:

It is hereby ordered this 12th day of December, 1911, that the said writ of error be and the same is hereby allowed and that the same may be issued by any officer authorized to issue the same, and the penalty of the bond is hereby fixed at the sum of \$1,000.00 with the United States Fidelity & Guaranty Company, a corporation, as surety thereon.

A. HUNTER BOYD.

(Endorsed:) Filed December 22nd, 1911.

51.

*Bond and Approval Thereon.*

#469,552—11.

Know all men by these presents, That we, D. E. Foote & Company, Inc., a corporation, William H. McGee, trading as William H. McGee & Company, J. Langrall & Brother, Inc., a corporation, and The C. L. Applegarth Company, a corporation, as principals, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Charles H. Stanley, Comptroller of the State of Maryland, in the full and just sum of one thousand dollars, to be paid to the said Charles H. Stanley, Comptroller of the State of Maryland, his certain attorney, successor in office, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 12th day of December, nineteen hundred and eleven.

Whereas, lately at a session of the Court of Appeals of Maryland in a suit depending in said Court, between D. E. Foote & Company, Inc., a corporation, William H. McGee, trading as William H. McGee & Company, J. Langrall & Brother, a corporation, and The C. L. Applegarth Company, a corporation, appellants, and Charles H. Stanley, Comptroller of the State of Maryland, appellee, a decree was rendered against the said appellants, and the said appellants having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Charles H. Stanley, Comptroller of the State of Maryland, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof.

Now, the condition of the above obligation is such, that if the said D. E. Foote & Company, Inc., a corporation, William H. McGee, trading as William H. McGee & Company, J. Langrall & Brother, Inc., a corporation, and The C. L. Applegarth Company, a corporation, shall prosecute said writ of error to effect, and answer

all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.]

D. E. FOOTE & COMPANY, INC.,  
By HAMPTON STEELE, *Sec'y & Treas.*

E. H. MILLER, *Witness.*

WILLIAM H. MCGEE, [SEAL.]

*Trading as William H. McGee & Company.*

[SEAL.]

J. LANGRALL & BROTHERS, INC.,

By LEANDER LANGRALL, *Pres't.*

[SEAL.]

THE C. L. APPELGARTH COMPANY,

By H. A. SCHLEGEL, *Sec'y & Treas.*

[SEAL.]

UNITED STATES FIDELITY &

GUARANTY CO.,

By W. W. SYMINGTON, *Vice-President;*

ALBERT H. BUEK, *Ass't Sec'y.*

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Approved by:

A. HUNTER BOYD,

*Chief Judge of the Court of  
Appeals of Maryland.*

(Endorsed:) Filed December 22nd, 1911.

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*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the  
[SEAL.] Honorable the Judges of the Court of Appeals of  
Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Maryland before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between D. E. Foote Company, Inc., a corporation, William H. McGee, trading as William H. McGee and Company, J. Langrall & Brother, Inc., a corporation, and the C. L. Applegarth Company, a corporation, plaintiffs and plaintiffs in error, and Charles H. Stanley, Comptroller of the State of Maryland, defendant and defendant in error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty,

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statute, or commission; a manifest error hath happened to the great damage of the said D. E. Foote & Company, Inc., a corporation, William H. McGee, trading as William H. McGee & Company, J. Langrall & Brother, Inc., a Corporation, and The C. L. Applegarth Company, a Corporation, plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twelfth day of December, in the year of our Lord one thousand nine hundred and eleven.

ARTHUR L. SPAMER,

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*Clerk Circuit Court of the United States  
for the District of Maryland.*

Allowed by:

A. HUNTER BOYD,

*Chief Judge of the Court of Appeals  
of the State of Maryland.*

(Endorsed:) Filed December 22nd, 1911.

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*Assignment of Errors.*

In the Court of Appeals of Maryland.

D. E. FOOTE & COMPANY, INC., a Corporation, et al.,  
vs.

CHARLES H. STANLEY, Comptroller of the State of Maryland.

*Assignment of Errors.*

D. E. Foote & Company, Inc., a corporation, William H. McGee trading as William H. McGee & Company, J. Langrall & Brother, Inc., a corporation, and The C. L. Applegarth Company, a corporation, the appellants in this cause and the plaintiffs in the Circuit Court of Baltimore City, assign the following error in the final decision of this Court by the decree filed herein on the 17th day of November, 1911:

1. The Court erred in holding and deciding that the plaintiffs in the Court below and the appellants in this Court were not entitled to maintain their bill of complaint in this cause, and in failing to reverse and remand this case to the Circuit Court of Baltimore City for



further proceedings under said bill of complaint, and the granting of the relief therein prayed.

2. That the Court erred in deciding that the charge or tax imposed by Section 69 of Article 72 of the Code of Public General Laws of the State of Maryland as re-enacted by Chapter 413 of the Acts of the Legislature of said State passed in the year 1910, was valid, and that said charge or tax and said Act are not in conflict with the constitution of the United States, for the following reasons:

(a) Because said Act is repugnant to Art. 1, Sec. 8 of the Constitution of the United States which vests in Congress exclusive power to "regulate commerce with foreign nations and among the several States and with the Indian Tribes," in that the charges or taxes therein prescribed interfere with the freedom of commerce among the several States, and the exclusive power of Congress over the same.

(b) Because said Act is repugnant to Art. 1, Sec. 10, of the Constitution of the United States which provides that "no State shall without the consent of the Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws," in that said Act provides that the charges or taxes therein prescribed are "to help defray the expenses of such inspection and the other expenses of the State Fishery Force," and that said charges or taxes are used for purposes other than the execution of the inspection laws of the State of Maryland, and that the charges or taxes therein prescribed are far in excess of what is needed for the execution of the inspection laws of said State.

(c) Because said Act is in other respects repugnant to the Constitution of the United States.

GEO. WHITELOCK,  
W. THOMAS KEMP,

*Solicitors for Petitioners and Appellants.*

(Endorsed:) Filed December 22nd, 1911.

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*Citation, Affidavit, and Service Thereon.*

In the Court of Appeals of Maryland.

D. E. FOOTE & COMPANY, INC., a Corporation, et als.,

vs.

CHARLES H. STANLEY, Comptroller of the State of Maryland.

To Charles H. Stanley, Comptroller of the State of Maryland, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the State of Maryland in a suit wherein D. E. Foote & Company, Inc., a corporation, William H. McGee, trading as William H. McGee & Company, J. Langrall & Brother, Inc., a corporation, and The C. L. Applegarth Company, a corporation, are plaintiffs in error and you are defendant in error,



to show cause, if any there be, why the decree rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable A. Hunter Boyd, Chief Judge of the Court of Appeals of Maryland, this 12th day of December, nineteen hundred and eleven.

A. HUNTER BOYD,  
*Chief Judge of the Court of Appeals of Maryland.*

60 STATE OF MARYLAND,  
*Baltimore City, to wit:*

I hereby certify that on this 21st day of December, 1911, before me, the subscriber, a notary public of the State of Maryland in and for Baltimore City aforesaid, duly commissioned and qualified, personally appeared W. Thomas Kemp, and made oath in due form of law that he delivered a true copy of the within citation to Charles H. Stanley, Comptroller of the State of Maryland, on the 21st day of December, 1911.

Witness my hand and Notarial Seal.

[SEAL.]

J. WALLACE BRYAN,  
*Notary Public.*

(Endorsed:) Service of copy admitted this 21st day of December, 1911.

EDWAR ALLAN POE,  
*Attorney General,*  
FREDERICK DALLAM,  
*Attorneys for C. H. Stanley, Comptroller.*

Filed December 22nd, 1911.

61 STATE OF MARYLAND, ss:

I, Caleb C. Magruder, Clerk of the Court of Appeals of Maryland, do hereby certify that the foregoing is a true and correct copy of the transcript of record, opinion, decree and judgment of the Court entered thereon, together with the petition for Writ of Error, order of Chief Judge Boyd, allowing writ to issue, Bond with approval thereon, Writ of Error, Assignment of Errors, Citation with proof of service thereon; all of which papers are now on file in the said Court, in the case of D. E. Foote & Company, a corporation, et als., versus Charles H. Stanley, Comptroller of the State of Maryland.

[Seal Court of Appeals, Maryland.]

In testimony whereof I hereto subscribe my name and the Seal of the Court of Appeals of Maryland affix- this eighth day of January, 1912.

CALEB C. MAGRUDER,  
*Clerk of the Court of Appeals of Maryland.*

Endorsed on cover: File No. 22,998. Maryland Court of Appeals. Term No. 159. D. E. Foote & Company, Incorporated, et al., plaintiffs in error, vs. Charles H. Stanley, comptroller of the State of Maryland. Filed January 8th, 1912. File No. 22,998.

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**IN THE**  
**Supreme Court of the United States.**

**No. 159, OCTOBER TERM, 1913.**

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**D. E. FOOTE & COMPANY, INC., ET AL., PLAINTIFFS IN  
ERROR,**

**VS.**

**CHARLES H. STANLEY, COMPTROLLER OF THE STATE  
OF MARYLAND, DEFENDANT IN ERROR.**

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**IN ERROR TO THE COURT OF APPEALS OF THE STATE OF  
MARYLAND.**

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**BRIEF FOR PLAINTIFFS IN ERROR.**

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**INTRODUCTION.**

This suit was instituted in the Circuit Court of Baltimore City (a Court of equity) for the purpose of enjoining the defendant in error, Comptroller of the State of Maryland, from collecting from the plaintiffs in error a certain tax or charge of one cent per bushel upon oysters in the shell, imposed by Chapter 413 of the Acts of the Maryland Legislature passed in 1910, the plaintiffs claiming that the Statute in question was invalid under the Constitution of the United

States, because it applied the major portion of the tax imposed thereby toward maintaining the Maryland State Fishery Force, an extensive navy charged with manifold duties hereinafter mentioned, none of which relates to inspection of oysters.

The bill of complaint was dismissed in the lower Court, and on appeal to the Court of Appeals of Maryland, the decree of the lower Court was affirmed (Foote vs. Stanley, Comptroller, 117 Md. 335). By writ of error to the Appellate Court, the Maryland Statute involved is now brought before this Court on the question of constitutionality *vel non*.

In a prior case (Foote vs. Clagett, Comptroller, 116 Md. 228) the Maryland Court of Appeals decided that Chapter 735 of the Acts of 1910 (also an oyster inspection law) was unconstitutional and void as being an interference with interstate commerce, and in reality a "revenue measure under the guise of an inspection law". Both Chapters 413 and 735 purport to repeal and re-enact the identical section (69) of Article 72 of the Code of Public General Laws of the State of Maryland (Edition of 1904).<sup>\*</sup> The two Acts differ only in the rate of the tax and the application of the revenue derived therefrom. (For comparison of the two Acts see pages 5-7 of this brief.)

#### STATEMENT OF THE CASE.

The plaintiffs are oyster packers in Baltimore City, and are large buyers of oysters in the shell shipped to them in vessels or cars from the oyster beds of the States of Mary-

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<sup>\*</sup>The Code references in this brief are made to the Maryland Code of 1904, to conform with references in the Record in this Court and in the opinion of the Court of Appeals of Maryland, both of which were prepared prior to the adoption of the Maryland Code of 1912. The Code of 1912 changes the numbers of corresponding sections of Article 72 as they appear in the Code of 1904.



land, Virginia and New Jersey. The number of bushels purchased by them during the oyster season of 1910-11, during which the tax here involved was imposed, and the location of the oyster beds where such oysters were caught, and from which they were shipped to the plaintiffs, respectively, appear in the Record (page 11), as follows:

<i>Packer.</i>	<i>Maryland.</i>	<i>Virginia.</i>	<i>New Jersey.</i>
D. E. Foote & Co., Inc. ....	163,850½	81,056	180
W. H. McGee & Co. ....	127,213	54,674	10,534
J. Langrall & Bro., Inc. ....	131,893	56,446	.....
C. L. Applegarth Co. ....	71,304	36,646	3,404

The oysters were delivered to the plaintiffs at their respective factories in Baltimore City in vessel loads, or part vessel loads (*i. e.*, less than cargo lots), or in barrels or bags, and in the same condition as shipped and brought from the respective localities in the three States where said oysters were caught (Record, 10).

Each of the plaintiffs paid the Oyster Packers' license tax of \$25, prescribed by section 77 of Article 72 of the Maryland Code, up to and including the season of 1910-11, and each of them paid annually the State and City taxes at the usual rate upon an assessment of miscellaneous "stock" at its or his factory (Record, 10). The plaintiffs declined to pay in addition the special tax of one cent per bushel on oysters delivered as above stated, and having been threatened by the State Comptroller with proceedings to enforce the collection of the special tax, they applied for an injunction restraining him.

The Statute here in question (Chapter 413 of the Acts of 1910), after providing for the number of inspectors and their salaries, proceeds as follows (Record, 2-3):

"\* \* \* the said special inspectors shall inspect all oysters in the district to which they are assigned; upon the inspection of any such oysters, each special inspector

shall make a certificate of the number of bushels in triplicate, one of which shall be given to the purchaser, one to the seller, and the other daily to the general measurer and inspector of the district where such inspection occurred; *a charge of one cent per bushel is hereby levied to help defray the expenses of such inspection* AND THE OTHER EXPENSES OF THE STATE FISHERY FORCE, *upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels*, to be charged equally to the buyer and seller, but to be paid weekly to the Comptroller of the State Treasury, or his agent, by the buyers; the certificate given the general measurer and inspector shall be by him mailed weekly to the Comptroller or his agent, and in case the amounts of money shown to be due be not paid in one week thereafter to the Comptroller or his agent, which is hereby required to be done, the properties of the parties so indebted may be levied on and sold by the said Comptroller or his agent, as in cases of taxes in default, without other process of law; the tax of one cent per bushel hereby levied is also made a charge on oysters sold by commission merchants and others selling by less than the cargo, and also a tax of three cents per barrel containing not more than three bushels; on oysters in bags a tax of two cents per bag containing not more than two bushels; *and all transportation companies carrying oysters in the shell consigned to Baltimore shall furnish to the oyster inspector or collector of oyster tax a copy of his manifest showing the number of bushels on board on arrival of steamer and to whom consigned, and the special inspectors are charged with the duty of seeing that proper returns are made for the purpose of this Act by such commission merchants or retailers; and in the performance of the duty the said special inspectors are authorized and directed to visit the places where oysters less than cargoes are sold and get from such sellers a statement, under oath, as to the number of bushels sold from time to time, and return to the general measurers and inspectors a certificate thereof to be forwarded to the Comptroller, as required in the case of the certificates for cargoes and the payment of the amounts so found to be due shall be similarly enforced."*

The tax of one cent per bushel thus prescribed is to be collected "*at the place where said oysters are to be no further shipped in bulk in vessels,*" and is to be applied to the payment of (1) "the expenses of such inspection" and (2) "THE OTHER EXPENSES OF THE STATE FISHERY FORCE".

The plaintiffs contend that this statute is unconstitutional and void for reasons specifically set forth by assignment of error as follows (Record, 35):

(a) Because said Act is repugnant to Article 1, Section 8 of the Constitution of the United States which vests in Congress exclusive power to "regulate commerce with foreign nations and among the several States and with the Indian Tribes," in that the charges or taxes therein prescribed interfere with the freedom of commerce among the several States, and the exclusive power of Congress over the same.

(b) Because said Act is repugnant to Article 1, Section 10 of the Constitution of the United States which provides that "no State shall without the consent of the Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws," in that said Act provides that the charges or taxes therein prescribed are "to help defray the expenses of such inspection and the other expenses of the State Fishery Force," and that said charges or taxes are used for purposes other than the execution of the inspection laws of the State of Maryland, and that the charges or taxes therein prescribed are far in excess of what is needed for the execution of the inspection laws of said State.

## ARGUMENT.

### I.

#### COMPARISON OF CHAPTERS 413 AND 735 OF ACTS OF 1910.

Chapters 413 and 735 of the Acts of 1910 are alike, in that they purport to repeal and re-enact the same section

(69) of Article 72 of the Maryland Code. They impose a fixed tax of the same nature upon the same commodity, and upon *all* oysters sold in Maryland, whether caught in this State, or shipped here from other States (e. g., Virginia or New Jersey). The two Acts differ in that one (Chapter 413) prescribes a rate of one cent per bushel, three cents per barrel and two cents per bag, while the other (Chapter 735) imposes a tax of two cents per bushel, six cents per barrel and four cents per bag. The Act now in question applies the tax toward the payment of the "expenses of such inspection and the other expenses of the State Fishery Force," and the other Act, already declared unconstitutional, divided the tax into two equal parts, one-half of which was to pay the expenses of inspection and the other expenses of the State Fishery Force, while the remainder of the revenue was "to be expended in reselling and otherwise cultivating and improving the natural oyster beds of the State".

In the case of *Foote vs. Clagett*, *supra*, the Court of Appeals of Maryland said with respect to Chapter 735:

"This Act, upon its face, discloses the fact that the charge of two cents per bushel is not necessary for the execution of the law, since it segregates one-half the charge and applies it to reselling the oyster bottoms of the State, thus enriching the resources of the State by a tax upon interstate commerce."

In other words, that Act (Chapter 735) having *expressly* appropriated one-half of the tax to other than inspection purposes, the State Court declared it void.

But should not the Maryland Court also have held that Chapter 413 was void for similar reasons? As already pointed out, the tax or charge of one cent per bushel prescribed by Chapter 413 is expressly levied for the purpose of defraying "the expenses of such inspection and the other expenses of the State Fishery Force". It, therefore, becomes important to ascertain the practical effect of thus dividing the revenue produced by the tax of one cent per bushel, and

applying it (1) to the cost of inspection, and (2) to the maintenance of the State Fishery Force. In approaching this inquiry it is necessary to consider in some detail the system of inspection of oysters in the shell and also the operations of the Maryland Fishery Force.

## II.

### INSPECTION OF OYSTERS IN MARYLAND.

The Maryland system of inspection of oysters in the shell is provided under a *separate subtitle* of Article 72, headed "General Measurers and Inspectors". Sections 68-75, inclusive, deal with their appointment, duties, supervision and compensation. There are four general measurers for Baltimore City, and five others for as many specified towns in Maryland. These general measurers are appointed by the Governor of the State, and supervise inspection of oysters sold in their respective districts. Twenty special inspectors are provided for Baltimore City. They are appointed by the Commander of the State Fishery Force and work under the supervision of the general measurers, who are required to render weekly statements to the State Comptroller of "the amount of oysters inspected or measured" in their respective districts, and to report, whenever required, to the Commander of the State Fishery Force. The Comptroller is charged with the duty of enforcing collection of the tax if the same be not paid by the buyer of the oysters within one week after inspection.

It is provided by the particular statute in question (quoted *supra*) that "the said special inspector shall inspect all oysters in the district to which he is assigned \* \* \*", and that the inspection is to be made upon "all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels". All transportation companies carrying oysters in the shell consigned to Balti-



more are required to furnish the inspector a copy of the manifest showing the number of bushels on board on arrival of the steamer, and to whom consigned, and these oysters must likewise be inspected and a return under oath made of the number of bushels thus shipped and received. The form of the certificate signed by the inspector, to be forwarded to the Comptroller, is set forth in the Act as follows:

\_\_\_\_\_, 19\_\_\_\_.

I hereby certify that I have this day inspected for Captain \_\_\_\_\_, schooner \_\_\_\_\_, a cargo of oysters, sold to \_\_\_\_\_, and found the same to contain \_\_\_\_\_ bushels of merchantable oysters, and \_\_\_\_\_ bushels of unmerchantable oysters.

(Signed) \_\_\_\_\_

### III.

#### MARYLAND STATE FISHERY FORCE.

The State Fishery Force is created by Article 72, sections 33 to 45, inclusive, under the heading "State Fishery Force". The vessels of the force are termed "guard boats", and are armed (section 33). For the efficient working of the force, *the waters of the State of Maryland are divided into seven districts, and the various vessels are assigned to "GUARD" the waters of the respective districts* (section 34). The force is under the control of the Board of Public Works, who appoint the commander and deputy-commanders, one for each sailing-vessel of the force (section 35). The Board may remove or suspend any officer of the force for neglect of duty (section 36), and must see that the vessels are kept in good repair (section 37).

*The vessels of the force are required to patrol the waters of the district assigned to them, in season and out of season,*

both day and night (section 38), and to guard places where violations of the law are suspected (section 39). "It shall be the duty of the oyster police force to diligently watch and guard and to arrest all violators of any of the provisions of this Article" (section 43). The State Fishery Force is also required to assist the Shell Fish Commissioners (having charge of oyster culture in Maryland waters) in "locating natural oyster beds, bars and rocks, and shall give the said commissioners every assistance in their power" (section 97). With respect to the State's elaborate system of oyster culture, it is especially provided that "it shall be the duty of all officers and members of the State Fishery Force to arrest persons violating these provisions (oyster culture laws), and to patrol such waters of the Chesapeake Bay and its tributaries as they may be directed" for that purpose (section 117). The State Fishery Force is also required to enforce all laws of the State relating to fish, whether *general* or *local*, and the commanders of the sloops and vessels are required to visit the tributaries and streams of their respective districts, and to arrest all persons violating the *fish laws* (section 44). The salary of the commander of the State Fishery Force is fixed at \$1,500 per annum, and the compensation of the other officers is likewise proscribed (section 41). The commander of the force is given general control and direction over the operations of the force. He is to keep an itemized account of the expenses and disbursements of the force, and is to report monthly to the Board of Public Works (section 45).

The Code prescribes the following additional duties and functions of the vessels and crews of the State Fishery Force—evidently a police organization and *not* an inspection corps—to be performed while guarding the waters of their respective districts, viz:

1. Prevent oyster tonging from April 25 to September 1 (15).
2. Prevent oyster dredging from March 15 to Nov. 1 (20).
3. Prohibit catching oysters at night or on Sundays (17).
4. Permit only residents of this State to catch oysters (1, 20).

5. See that every tonger takes out a County license (1).
6. Confine tongs to waters of County issuing license (1).
7. Prohibit use of ropes or hoisting gear by tongs in certain waters (6).
8. See that every dredger takes out a license from the Comptroller (20), or from the County Clerks (23).
9. Measure all dredging vessels and verify license paid at rate of \$2.85 per ton (23).
10. Confine dredging to certain specified waters (20).
11. Prevent steamers or power boats from engaging in dredging (19).
12. Prohibit dredging machinery on board vessels not licensed (21).
13. Prevent dredging in or near Craighill or Cut-off Channels (51).
14. Enforce special provisions relating to catching oysters by tongs or dredgers in Patapsco, Potomac and Choptank Rivers (52-67).
15. Exclude tongs and dredgers from certain exempted waters (76).
16. Prohibit licensed dredge boats from being armed (26).
17. Arrest dredge vessels owned wholly or in part by non-residents (20).
18. See that proper black or red license numbers are exposed on mainsails of dredge-boats (31).
19. See that all oysters caught in Maryland waters are culled on natural beds and bars where taken, and that undersized oysters and shells are replaced thereon (7).
20. Prevent shipment of undersized oysters out of State (8-A).
21. Enforce cull law upon natural beds and bars of Potomac River (67-A).
22. Protect riparian owners of private oyster beds (46-50).
23. Protect lessees of barren bottoms under Oyster Culture law (117).
24. Pursue and arrest all vessels equipped for dredging, if found in exempted waters (32); etc., etc.

The expenses of the State Fishery Force, including the purchasing and maintaining of steamers and sail boats, providing fuel and provisions, and paying salaries of the commander, deputy commanders and crews, and all other incidental expenses, are to be paid out of a special fund known

as the "Oyster Fund" set apart by section 30, reading as follows:

"All moneys received or obtained from dredging licenses issued under the provision of the preceding sections of this article, and one-third of the moneys received from the county scraping licenses, and all fines penalties or forfeitures imposed in pursuance thereof, shall upon the warrant of the comptroller, be paid into the treasury and placed to the credit of a fund which shall be called the OYSTER FUND, and the same shall be kept separate and distinct from other funds in the treasury and shall only be drawn upon for the purpose of maintaining sufficient and proper police regulations for the PROTECTION OF FISH AND OYSTERS IN MARYLAND WATERS and in the payment of the officers and men and keeping in repair and supplying the necessary means of sailing the boats and vessels of the State Fishery Force; and the comptroller is hereby required to state in his annual report particularly the receipts and expenditures on account of said funds and the balance standing to the credit of the State at the time of making such report."

#### IV.

##### DIVERSION OF REVENUE PRODUCED BY CHAPTER 413.

The agreed statement of facts (Record, 11-15) contains the figures showing the amount of the tax actually collected at the rate of one cent per bushel under section 69 of Article 72 during the seasons of 1908-9 and 1909-10, and the disposition thereof. In the season of 1908-9 the tax amounted to \$35,632.95; the salaries of the measurers and inspectors amounted to \$13,622, and the balance, or excess, of \$22,010.95, was carried to the credit of the "Oyster Fund" (being the fund provided for by section 30 above quoted). In the season of 1909-10 the tax collected amounted to \$43,671.94, while the salaries of the measurers and inspectors amounted

to \$14,991, leaving an excess of \$28,380.94, which was likewise carried to the credit of the "Oyster Fund".

Extracts from the official reports of the Comptroller and from the detailed statements accompanying same during these two years are set forth in the Record (pages 11-15). In the report for the year ending September 30th, 1909, the Comptroller says: "the tax of one cent per bushel on all oysters inspected in this State, as enacted by Chapter 488 of the Acts of 1908, has been sufficient *not only to pay the cost of such inspection*, but also to carry to this (oyster) fund *the balance or excess of \$22,010.95*". In the next annual report, the Comptroller says: "The receipts from dredging and tonging licenses show a heavy shrinkage, by reason of fewer boats engaged in the industry. Nevertheless, *the excess tax of one cent per bushel on oysters sold amounted to \$28,680.94*". It is significant that in both of these years the Comptroller, in preparing the itemized statements of receipts and disbursements for account of the *Oyster Fund*, carries into said fund the *balance*, or *excess*, referred to in his reports, after paying from the gross amount of the tax collected the disbursements for account of salaries of measurers and inspectors, which in at least one report is treated by the Comptroller as synonymous with "the cost of such inspection".

The Comptroller's report for the season of 1910-11 had not been filed at the time this case was heard in the Circuit Court of Baltimore City, but during that season it is shown that the tax collected under Chapter 735 at the illegal rate of *two cents per bushel* amounted to \$50,356.88 (of which one-half went to the credit of the "Reshelling Fund"), and that, at the rate of *one cent per bushel*, \$430.14 had been actually collected, and the State claims that at the rate of *one cent per bushel*, the sum of \$13,790.17 was still owing by the oyster packers. Entirely apart from the contribution to the "Reshelling Fund", the tax collected or charged aggregated nearly \$40,000, for that season, while the disbursements for



salaries of measurers and inspectors amounted to \$15,093 only.

The reports of the Comptroller for the past three years thus show conclusively that the tax at the rate of one cent per bushel has provided nearly three times as much revenue as was necessary to pay the salaries of the measurers and inspectors of oysters, and that the excess, or about two-thirds of the tax, has been in each year diverted from inspection expenses and carried to the credit of the "Oyster Fund"—a separate fund which, under the law (Section 30), is required to be kept apart "for the purpose of maintaining sufficient and proper *police* regulations for the protection of *fish* and *oysters* in *Maryland* waters."

In the very words of the Comptroller himself, who commented on this tax at a time when no issue had arisen as to its reasonableness for inspection purposes, "the tax of one cent per bushel on all oysters in this State \* \* \* has been sufficient *not only to pay the cost of such inspections*, but also to carry to this fund (the Oyster Fund) the balance or excess of \$22,010.95." The figures for that year demonstrate that the Comptroller regarded the "cost of inspection" and the "*salaries of measurers and inspectors*" as identical both as to classification and amount.

The excess tax collected each year was, in accordance with the *express* requirement of the statute in question, carried into a fund set apart by another statute for the maintenance of the State Fishery Force. In sustaining the statute in question (Chapter 413), the Maryland Court of Appeals has held that the expense of maintaining and operating the State Fishery Force may be constitutionally superimposed upon the conceded cost of inspection, because in the opinion of that Court the operations of the State Fishery Force heretofore described are so connected with the inspection of cysters as to blend the two departments, rendering them one and the same.

The main inquiry, therefore, in this appeal is whether the maintenance of an extensive navy, at a cost of over \$60,000 per annum, to *patrol Maryland waters, to protect fish and oysters in Maryland waters* and to facilitate and *protect oyster culture in Maryland*, is reasonably necessary to accomplish the inspection of oysters "*at the place where said oysters are to be no further shipped in bulk in vessels,*" when the statute in question provides for a special corps of inspectors charged with that particular function and in no manner connected with or dependent upon the State Fishery Force. In approaching this inquiry, it is important to bear in mind the sound legal principle applied in the case of *Foote vs. Clagett* (116 Md. 228), that the constitutionality of a tax on *all oysters in the shell, sold in the State of Maryland*, is to be tested by the operation of that tax upon oysters shipped *from other States into Maryland*.

What, therefore, is the legitimate scope of a State inspection measure under the Federal Constitution, and to what extent will the Courts pass upon the constitutionality of a statute prescribing the tax therefor?

## V.

### STATE INSPECTION UNDER FEDERAL CONSTITUTION.

The Federal Constitution vests Congress with the exclusive power to regulate interstate commerce (Article 1, Section 8), and prohibits a State from laying duties on imports or exports, except such as may be absolutely necessary for purposes of inspection (Article 1, Section 10). It is unnecessary to consider the operation of Section 10, apart from Section 8, for under Section 8, as hereinafter shown, a State is accorded the right to pass inspection laws and to collect such amounts as may be necessary to pay the expense thereof.

As was aptly said by Chief Justice Fuller in *Patapasco Guano Co. vs. Board of Agriculture*, 171 U. S. 345, "Section 10 of Article I expressly recognizes the validity of State inspection laws, and allows the collection of the *amounts necessary for their execution*, and we think the *same principle must apply to interstate commerce*" (under Section 8).

Quoting from *Robbins vs. Shelby Taxing District*, 120 U. S. 489, the Maryland Court of Appeals in *Foot v. Clagett*, *supra*, correctly adopted the following language (116 Md. 235-6):

"The only way in which commerce between the States can be legitimately affected by State laws is when, by virtue of its police power \* \* \* a State provides for \* \* \* the passage of *inspection laws* to secure the *due quality and measure* of products and commodities."

In other words, under Article 1, Section 8 of the Federal Constitution, the State of Maryland can impose no tax upon Virginia and New Jersey oysters, except such as may be *reasonably necessary for inspection purposes "to secure the due quality and measure of" the oysters shipped from Virginia and New Jersey into Maryland and inspected in Maryland at the termination of the shipment.*

#### (a) *Scope of State Inspection Laws.*

In *Gibbons vs. Ogden*, 9 Wheaton, 1, at page 203, Chief Justice Marshall says:

"The object of inspection laws is to improve the quality of articles produced by the labor of the country, to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose."

In *Brown vs. Maryland*, 12 Wheaton, 419, at pages 437-8, Chief Justice Marshall again says:

"The limitation is 'except what may be absolutely necessary for executing its inspection laws.' Now the inspection laws \* \* \* so far as they act upon importations, are generally executed upon articles which are *landed*. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for services performed on land while the article is in the bosom of the country."

In *Foster vs. New Orleans*, 94 U. S. 246, it is said:

"The object of such laws is to certify the quantity and value of the articles inspected, whether imports or exports, for the protection of buyers and consumers."

In *Turner vs. Maryland*, 107 U. S. 38, 55 (affirming 55 Md. 240), it is said:

"Recognized elements of inspection laws have always been: quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements."

In *People vs. Compagnie Generale Transatlantique*, 107 U. S. 59, at pages 62-3, Justice Miller said:

"What is an inspection? Something which can be accomplished by *looking at* or *weighing* or *measuring* the thing to be inspected or *applying to it at once some crucial test*."

The above cases, and many others that might be cited, establish the limitations within which a State must exercise its right by statute to ascertain the size, weight, quality and grade of commodities shipped into that State from another State, or from foreign countries. Interstate commerce can only be impeded by such local statutes as seek fairly and hon-

estly to protect the citizens of a State from the fraud of short measures, or injury by introduction of dangerous or unwholesome articles. The act of inspection of goods shipped into a State must be performed at the termination of the shipment, or, as Chief Justice Marshall observes, it must be on land, "while the article is in the bosom of the country." The person to perform the inspection must be one qualified to measure, weigh or in some manner judge as to the particular commodity to be examined.

Applying these fundamental principles to the present statute, the inspection of New Jersey and Virginia oysters must take place at the factories of the purchasers. In the express language of Chapter 413, the inspection must take place "at the place where the oysters are to be no further shipped in bulk in vessels." The person who makes the inspection must be a duly authorized measurer or inspector. The function of the inspector is to measure the oysters for the purpose of ascertaining their quality, size and bulk. Those actually inspecting the oysters must be under the charge and supervision of superior officers, such as the general measurers and inspectors of oysters, and these, in turn, must report to the head of a governmental department. Whether it be to the Commander of the State Fishery Force, the Governor of the State of Maryland, the Comptroller of the State, the Board of Public Works, or any other duly constituted authority, is quite immaterial. The fact remains that the inspection is actually performed by an organized corps of measurers and inspectors assigned to various districts and charged with the duty of seeing that all oysters therein sold are inspected as required by law.

Such a system or department is complete in itself. It accomplishes all the functions permitted by the Federal Constitution, in that it safeguards the public against fraud or deception. It is obvious that the legitimate expense of such a system must be confined to the salaries of the persons em-



ployed to accomplish the inspection, and such incidental expenses as may be incurred by that department.

To introduce a purely extraneous charge as a cost of inspection, or to appropriate the tax collected to a foreign purpose, would take the statute beyond the limitation upon freedom of interstate commerce, permitted by the Federal Constitution. It would no longer be "an inspection law," but would pass into the category of "a revenue measure".

(b) *Extent to Which Courts Pass upon Constitutionality of Inspection Laws.*

The Maryland Court of Appeals has itself categorically answered this question in the prior case of *Foote vs Clagett*, where it is said (116 Md. 240):

"No tax can be laid by a State \* \* \* except such as may be absolutely necessary for executing its inspection laws, and the Courts are to judge of the reasonableness of the tax for that purpose \* \* \*. This Act is in fact a revenue measure under the guise of an inspection law."

When the statute now in question was brought before the Maryland Court of Appeals for review, and its attention was called to the earlier opinion on this point, the Court said (117 Md. 343-4):

"When that case (*Foote vs. Clagett*) was before us the law we were then considering imposed a charge of two cents per bushel, one-half of which only was applicable to inspection, and the other half was applied to increasing the productitivity of the oyster beds of the State. It thus showed *upon its face* that it was in fact, to the extent of one-half the charge, a revenue measure, and that the whole charge was for that reason both unreasonable and illegal. *In that case* therefore, we were warranted in holding that the Court should judge of the reasonableness of that charge, but the language may be conceded to be too broad when applied to a case like the present where the reasonableness of the tax as to the amount merely, is involved."

But here, it is submitted, lies the fundamental error of the Maryland Court in its analysis of the statute in question. The objection urged by the plaintiffs to the tax imposed by Chapter 413 is not "as to the *amount merely*" of the tax. As has already been pointed out, the plaintiffs' objection is that Chapter 413 appropriates a portion (in effect two-thirds) of the tax to the "expenses of the State Fishery Force". Here is a clear diversion of the funds derived from the tax in question, and the distribution of these funds by the State Comptroller, so that one-third is applied toward the cost of inspection, and two-thirds toward the expenses of the State Fishery Force, is squarely within the very objection which the Maryland Court of Appeals itself decided to be fatal in *Foote vs. Clagett*.

Nor do the decisions of this Court justify the conclusion which the Maryland Court of Appeals has reached with respect to the statute in question.

In *Brown vs. Maryland*, 12 Wheaton, 419, 466-7, Chief Justice Marshall said:

"What, then, is the just extent of a power to regulate commerce with foreign nations and among the several States? \* \* \* Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? *Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part.* It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. *Congress has a right, not only to authorize importation, but to authorize the importer to sell.*"

In *Robbins vs. Shelby Taxing District*, 120 U. S. 489, Justice Bradley said:

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign Nations, but among the several States, that power is necessarily exclusive \* \* \*. The only way in which commerce between the States can be legitimately affected by State laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities; *the passage of inspection laws to secure the due quality and measure of products and commodities*, the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein."

In *Leisy vs. Hardin*, 135 U. S. 100, 108, Chief Justice Fuller said:

"The power vested in Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and *cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered.*"

Thus has this Court in construing section 8 of the Constitution, declared, in most explicit terms, that Congress has

the exclusive power over interstate commerce, and that State Legislatures may enact only such laws pertaining thereto as come within certain well defined limitations.

One of the limitations recognized by this Court is the right of a State, in the exercise of its police power, to pass "inspection laws to secure the due quality and measure of products and commodities." It could hardly be seriously contended that the various State Legislatures in the exercise of the privilege thus given them to enact proper inspection laws are to be regarded as the final judges of the legality of their own acts. And yet this would follow if the Courts are not to be permitted to decide whether a particular Legislature has exceeded its privilege and passed a law imposing a tax which, on its face, or in necessary effect, is to be devoted toward other purposes than the cost of inspection.

In *Turner vs. Maryland*, 107 U. S. 38 (a case relied upon by the Maryland Court of Appeals), the recognized elements of valid inspection laws are set forth in the language above quoted from that case. The Court then said:

"There is nothing in the record from which it can be inferred that the State of Maryland intended to make its tobacco inspection laws a mere cover for laying revenue duties upon exports."

It thus appears that the Court in that case *did* pass upon the legality of the statute, finding it to be within proper constitutional limitations.

Much stress was laid at the argument in the State Court and in the opinion of the Court of Appeals of Maryland upon the case of *New Mexico vs. Denver & R. G. R. Co.*, 203 U. S. 38, where it was said by Justice Day:

"The law being otherwise valid, the amount of the inspection fee is not a judicial question. It rests with the Legislature to fix the amount, and *it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law.*"

The New Mexico case merely sustained the provision of a law for inspection of hides as designed to prevent the criminal or fraudulent appropriation of cattle by furnishing some evidence, at least, tending to identify the ownership of the cattle. And the true interpretation of the opinion of Justice Day, must not ignore the last part of the quotation (*italics ours*). We respectfully submit that an examination of the case will plainly show that this Court did not mean, by the language just quoted, that the Legislature is to determine the constitutionality of its own Acts; but that a fair and reasonable interpretation of an inspection law will be placed upon a statute purporting to be such, and if the tax which it prescribes is reasonably necessary for legitimate inspection purposes, that then the Courts will not interfere to strike down the law. The Legislature is, in such cases, to be credited with an honest intention to enact an inspection measure for the protection of the property, health or safety of its citizens.

As was said by Justice Harlan, in *Mugler vs. Kansas City*, 123 U. S. 623, at page 661:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State \* \* \* The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, *are under a solemn duty*—to look at the substance of things, whenever they enter upon the inquiry, whether the Legislature has transcended the limits of its authority. If, therefore, a statute *purporting* to have been enacted to protect the public health, the public morals, or the public safety, has no *real* or *substantial* relation to those objects, or is a *palpable invasion of rights secured by the fundamental law*, it is the *duty* of the *Courts* to so adjudge, and thereby give effect to the Constitution."

An excellent statement of the true doctrine appears in the case entitled *In re Rebman*, 41 Fed. 867 (affd. *Brimmer vs. Rebman*, 138 U. S. 78). The Court was there dealing with



a Virginia statute imposing an inspection tax of one cent per pound on all fresh meat slaughtered more than 100 miles from the place in Virginia where the meat was offered for sale. Judge Hughes said:

"It is undeniable that a State of this Union, like all other self-governing States, has the power to enact inspection laws for the public safety. It has as clear a right to this power as it has to existence. It may enact and enforce inspection laws adapted to secure the public safety, even though they trench upon and more or less obstruct the freedom of trade between the States. It is equally true, however, that inspection laws, to be within the sovereign prerogative of the State, and to stand superior to cardinal provisions of the National Constitution, must be essentially and really such in character, purpose and operation. To call a law an inspection law does not make it one competent to override any tenet of constitutional law. It must be an inspection law in spirit and in truth, in order that its character as such shall be respected; and even though it be, in its essence and design, an inspection law, yet in order that it may not be subordinated to the provision of the Constitution establishing the freedom of interstate commerce, it must be a 'reasonable' law, properly devised for preventing the evil at which it is aimed; so devised as to no more than effectuate that purpose, and as not to subserve other objects unessential to the public safety. When inspection laws are abused for the latter ends, and thereby affect foreign commerce and trade between the States, it is competent for the National Courts—it is made our 'solemn duty'—to pronounce them invalid, and to forbid their enforcement."

In affirming this decision, Justice Harlan, on behalf of this Court (*Brimmer vs Rehman*, 138 U. S. 83), said:

"The statute, by reason of the onerous nature of the tax imposed in the name of compensation to the inspector, goes far beyond the purposes of *legitimate inspection* to determine quality and condition, and by its necessary operation obstructs the freedom of commerce among the States."

In *Minnesota vs. Barber*, 136 U. S. 313, 319-20, Justice Harlan said:

"There may be no purpose upon the part of a Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the *courts* must sustain the supreme law of the land by declaring the statute unconstitutional and void. \* \* \* It is *our duty to inquire*, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

In the case of *Fertilizer Co. vs. Board of Agriculture*, 43 Fed. 609, a tax of \$500 on each brand of commercial fertilizer sold in the State of North Carolina was held unconstitutional and void because the tax imposed was a "*much larger sum than can be necessary for its inspection* \* \* \*. Such a tax would be constitutional, only within the limits of the Constitution. It cannot be sustained when evidently in *excess* of what is required for such purpose, and when the proceeds are applied to *other uses*."

The North Carolina Legislature thereupon amended the law so as to impose an inspection tax of twenty-five cents per ton on fertilizers sold within the State, and the Supreme Court looked to the amount of the tax to decide its legality. In *Patapsco Guano Co. vs. Board of Agriculture*, 171 U. S. 345, where the new tax was sustained by this Court, Chief Justice Fuller said:

"The Act must be regarded, then, as an Act providing for the inspection of fertilizers and fertilizing materials, in order to prevent the practice of imposition on the people of the State, and the charge of twenty-five cents per ton as intended merely to defray the cost of such inspection."

In *Postal Company vs. Taylor*, 192 U. S. 64, a municipal ordinance imposing a license fee upon telegraph poles was held unconstitutional and void, because it imposed an unreasonable and excessive tax. Justice Peckham said:

"It must be remembered that such a tax is authorized only in support of police supervision, *and, if it were possible to prove in advance the exact cost, that sum would be the limit of the law.* \* \* \* The fee itself is twenty times the amount of expense that might have been reasonably and fairly incurred to make the most careful, thorough and efficient inspection and supervision that might have been made of such poles and wires. \* \* \* To uphold it in such a case as this is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet, because it is said to be an inspection measure, the Court must take it as such and hold it valid."

The *Patapsco* case recognized the general principle that the States may inspect for the prevention of fraud, and that this power, when lawfully exerted, prevails over the freedom of interstate commerce, but the *Postal* case shows with equal clearness that the State must respect the precise constitutional limitations, and that the Courts themselves will consider the amount levied and the purposes to which it is to be applied in order to determine the good faith and validity of the measure.

In *Western Union Telegraph Co. vs. Kansas*, 216 U. S. 1, 27, Justice Harlan, after reviewing many of the cases above cited, said:

"If the statute, *reasonably interpreted*, either directly or by its necessary operation, burdens interstate commerce, *it must be adjudged to be invalid*, whatever may have been the purpose for which it was enacted, and

although the company may do both interstate and local business. This Court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction, as the adjudged cases abundantly show."

In *Red "C" Oil Mfg. Co. vs. Board of Agriculture*, 222 U. S. 381, 394, Chief Justice White, commenting on an inspection law, held that a State has authority "to impose a fee *solely to recompense the State for the expenses properly incurred in enforcing the authorized inspection.*"

In *Savage vs. Jones*, 225 U. S. 501, a statute of Indiana imposing an inspection tax upon all stock foods sold in that State was held valid because the Court found it reasonable as an inspection measure.. Justice Hughes said:

"The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. \* \* \* But when the local police regulation has real relation to the suitable protection of the people of the State, *and is reasonable in its requirements*, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. \* \* \* The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals—a matter of great importance to the people of the State. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but, without discrimination, sought to promote fair dealing in the described articles of food."

And thus it is obvious that the Courts do judicially ascertain the reasonableness or unreasonableness of the amount of the tax when called to decide whether or not a particular statute is legitimately designed as an inspection measure, or is merely put in that form as a disguise for a revenue law.

Summarizing, then, the principles of the foregoing cases, it may be safely concluded that the Federal Constitution contemplates and permits only such State inspection taxes as are reasonable in amount, single in purpose, and assessed under a law designed for the protection of the health or safety of the community, as distinguished from a tax which, in whole or in part, levies tribute upon interstate commerce for the enrichment of the coffers of the taxing State itself.

## VI.

### THIS TAX IS GROSSLY EXCESSIVE AND IS IMPOSED FOR OTHER THAN INSPECTION PURPOSES.

The tax derived from the statute in question (Chapter 413), when examined in the light of the above decisions, clearly transcends the limits of an inspection measure. On its face, and in practical operation, the statute is a revenue measure. It produces a tax which supports to a large extent an extensive navy operated as a State Fishery Force. As already demonstrated, this force is *essentially a police organization*. It is composed of armed vessels, assigned to patrol particular districts into which the Chesapeake Bay and its tributaries are divided. The Maryland oyster laws constitute a complex system. The tongers, scrapers and dredgers are duly licensed and permitted to work in certain seasons, at certain hours, and in certain waters. In some waters of the bay and its tributaries, catching oysters is totally prohibited. In others, tongers only can catch oysters, and then with certain kinds of rakes. Only certain kinds of boats can engage in dredging. It is unlawful for unlicensed boats to have dredging machinery on board. The Maryland oysters must be culled where caught, and the young oysters restored to the natural beds. The rights of owners



of private beds and lessees of barren bottoms must be vigilantly guarded. Piracy upon Maryland oyster grounds by non-residents must be prevented. The fish laws must be enforced. All these and numerous other detailed functions are prescribed by law as the duties of a State Fishery Force, composed of steamers and vessels especially equipped with armament and crew to patrol the waters of the State.

But the policing of the oyster grounds in accordance with the numerous provisions of Article 72 of the Maryland Code is not connected in the remotest manner with the inspection of Virginia and New Jersey oysters at the termination of the shipment. These oysters must reach the factories of the packers before an inspection under the statute can possibly be made. Upon arrival of the vessel-loads of oysters the measurers and inspectors are the *exclusive* agents for measuring and inspecting the oysters. They do not need, and can not use, the police boats in the performance of the duty of *inspection*.

It is almost ludicrous to contend, as argued for the State in the Court of Appeals, that vessels are needed to ply along the banks of hidden creeks and streams in the hope of discovering a secluded factory where oysters are bought in such quantities as to *attract interstate shipments*. An oyster factory cannot be operated by clandestine methods. Shucking the oysters necessitates the employment of numerous hands, and that alone assures publicity of operation. The factory itself must be at a shipping center where the shucked oysters may be quickly sold or shipped. The fact that oysters in the shell shipped into Maryland from other States *must* be unloaded and sold in Baltimore City or at other riparian towns, is so patent that Courts may take judicial notice of the utter impossibility of eluding the inspectors, even supposing that the appellants and those engaged in a similar vocation were disposed to run the risk of the heavy penalties prescribed by the law for "purchasing or receiving oysters,

unless a general inspector, measurer or special inspector shall be present."

It was also argued that the Oyster Police Force may aid in inspecting oysters in the shell, which in some instances are delivered by tongers and dredgers to "buy-boats." But the obvious answer is that Chapter 413 expressly states that the inspection is to be made at "the place where the oysters are to be *no further shipped in bulk in vessels.*" This excludes an inspection on the oyster grounds, assuming such were practicable or even possible. Furthermore, we are now testing the law by its application to oysters shipped into Maryland *from other States*, and clearly such oysters are to be inspected only at the *termination* of the shipment, and not in mid-river where "buy-boats" are stationed to receive oysters from the small boats catching oysters in that vicinity.

And yet it was the opinion of the Court of Appeals that the duties of the State Fishery Force on the one hand, and those of the inspectors of oysters on the other, were so entwined and interwoven as to make the expense of the former a legitimate item of the cost of the latter.

True it is, that the commander of the State Fishery Force has, under the law, a certain supervision over the measurers and inspectors. He may appoint, assign and remove them. But it is only *the commander* who has the right to appoint, assign and remove the inspectors, and they are to report to no other officer or employe of the State Fishery Force. *In fact, Article 72 makes it perfectly apparent that the inspection department and the police department are entirely separate and distinct.* The inspection of oysters shipped into Maryland from other States is totally different from any duty or function to be performed by the State Fishery Force, and the vessels and crew of the State Fishery Force have nothing whatever to do with the inspection of oysters shipped into Maryland from other States. The only connecting link is the fact that the same person who is made the head of the

State Fishery Force is likewise vested *ex officio* with certain rights and duties in supervising the measurers and inspectors, who are themselves charged with the inspection of oysters. His duties as commander in relation to the State Fishery Force are legion, and it would be relatively fair to assume that but a small part of the salary which is paid him could be properly apportioned as compensation for his services in actually supervising the inspectors. But the fallacy of the State's contention can be no better illustrated than by taking the *whole* salary of the commander of the State Fishery Force (\$1,500 per annum), adding to it the salary of his clerk (\$1,000 per annum) and giving him a liberal allowance for stationery, office expenses and traveling expenses in supervising the inspectors. Even then, the charge of one cent per bushel would be *more than twice as much* as is necessary to cover the augmented cost of inspection, after carrying into the calculation the *whole* of the salaries and expenses of the measurers and inspectors, a portion of whose duties has nothing whatever to do with the *inspection* of oysters within the meaning of the Federal Constitution.

The Virginia and New Jersey oysters are shipped into Maryland for sale, and the tax of one cent per bushel is imposed concurrently with, if not in effect prior to the original sale of the shipment. It is made unlawful for the packer to unload the oysters from the vessels, except in the presence of an inspector (Article 72, section 10). As already stated, the statute designates the place of inspection at the *termination* of the shipment. The single constitutional privilege of the inspectors is to see that the oysters shipped from other States are of merchantable size and quality, and are accurately measured in bulk. The charge of one cent per bushel during the three years preceding the hearing in the State Court has yielded approximately three times the revenue necessary to pay the salaries of measurers and inspectors. We are not now concerned with the fact that the Maryland

law requires these same inspectors to see that the oysters caught on Maryland bottoms are properly culled when and where caught, and, if not, to require the vessel-load to be returned to the beds and bars from which the oysters were taken (Article 72, sections 8-9). Nor are we here dealing with the duties of the measurers and inspectors to see that the oysters when *shucked* are measured exclusively in the oyster gallon cup of the dimensions prescribed in the statute (section 80). We are not concerned with the statutory duty of the measurers and inspectors to see that *all* the other provisions of the oyster law are complied with (section 71). The proper performance by them of such duties might, indeed, require the co-operation and intervention of an armed oyster police force, with all its attendant expense. But all these duties are superadded to the *one* legitimate function under the Federal Constitution *with respect to oysters shipped from other States*, which is, and can only be, to inspect those oysters *on land* where the oysters are "to be no further shipped"—and solely to ascertain their quality and quantity.

If a tax of one cent per bushel, yielding thrice the revenue necessary to pay the legitimate cost of inspection, is to be sustained, why, then, was not a charge of two cents per bushel as enacted by Chapter 735, likewise sustained? It is not a sufficient answer to say that by Chapter 735 one-half that tax was expressly devoted to reselling the natural oyster beds, and the Act was therefore unconstitutional. In this case two-thirds of the tax is admittedly carried as an "excess" to the credit of the Oyster Fund and used in the maintenance of the Oyster Police Force, a force charged generally with the duty of patrolling Maryland waters, and there enforcing the numerous laws designed for the *protection and preservation* of Maryland products alone.

In testing inspection statutes under the Federal Constitution, no distinction whatever may be drawn between the two laws, one of which (Chapter 735) appropriated one-half of

the tax on Virginia and New Jersey oysters toward *reshelling and improving Maryland oyster beds*, while the other (Chapter 413) applies the excess (two-thirds) tax on Virginia and New Jersey oysters toward *policing and protecting fish and oysters and promoting oyster culture in Maryland waters*. If, under the guise of an inspection measure, the Legislature may lawfully provide by Chapter 413 for the collection of a part of the revenue required to maintain the State Fishery Force, then necessarily it may lawfully, and by a similar measure, raise the entire revenue required. Or the tax of *one cent per bushel* (of which two-thirds now goes to the Oyster Fund) might be made *two cents*, and the duty of reshelling the Maryland oyster beds and bars might be added to the long list of kindred functions already performed by the State Fishery Force: the result would be to validate the identical measure condemned in the Clagett case.

In fact, it now appears that by subsequent legislation (Act 1912, Chapter 539), the Maryland Legislature has appropriated toward this same object—*reshelling the Maryland oyster beds*—one-half of the revenue arising from an elaborate system of oyster culture under Maryland waters. As heretofore shown, one of the most important functions of the State Fishery Force is to protect the beds leased by the State for oyster culture, the total net revenue from which the Act of 1912 divides equally between the "Special Road Fund" and the "Fund for the Conservation of Natural Oyster Bars." Thus two-thirds of the tax raised by the objectionable inspection law is paid to maintain a patrol over planted bottoms which in their turn support the highways and natural oyster beds of the commonwealth. And in the face of so deliberate a diversion of two-thirds of the tax, the State actually contends that the statute in question does not exceed the established limit of the State's "authority \* \* \* to impose a fee solely to recompense the State for the expenses



*properly incurred in enforcing the authorized inspection*" as stated by Chief Justice White in *Red "C" Oil Mfg. Co. vs. Board of Agriculture (supra)*.

The State relies on the case of *New Mexico vs. Denver & R. G. R. Co. (supra)*, as an authority to sustain the Maryland statute, because in that case the surplus revenue was made payable to the Cattle Sanitary Board of the Territory, and the Act was nevertheless held valid. But the analogy fails. It appears from the printed record in the New Mexico case that the relator founded his objection to the excess fees upon the fact that an inspector might earn more on some days than by any possibility his *per diem* and expenses could cost. It did not, however, appear that on other days the tax collected would exceed, or even equal, the inspector's *per diem*. Moreover, on the facts of the case, the Court could not see that the legitimate cost of the inspection would not include the expenses of the Board. It was upon that hypothesis that this Court upheld the law, saying (page 55):

"In the territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against '*criminal aggression*' upon this class of property. The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of the people of the territory are interested, seems to us an obviously rightful exercise of this power."

In other words, an inspection applicable to the peculiar situation in New Mexico required not so much an examination of the *hides themselves*, but a notation and preservation among the records of the Cattle Sanitary Board of branding marks found thereon, for the purpose of enabling the true owner to trace his property and thereby prevent fraud or "criminal aggression." The Court there took judicial cognizance of the fact that the branding marks were the only

"indicia" of ownership of the cattle. *The Cattle Sanitary Board existed solely for the purpose of effectuating the real object of the inspection, and therefore its expense was a legitimate part of the cost of inspection, such as was needed in that case to protect the property of the citizens of the Territory. Consequently, the Court found, from the facts of that case, that the law was a bona fide inspection measure.*

In *Red "C" Oil Manufacturing Co. vs. Board of Agriculture (supra)*, a North Carolina statute provided for the inspection of illuminating oils sold in that State, *by the Commissioner of Agriculture and his assistant inspectors*, and for the imposition of a charge of one-half cent per gallon, to be paid to the Commissioner of Agriculture to be used in "*defraying expenses connected with the inspection, testing and analyzing of oils.*" The Act was attacked a few days after it went into operation, one of the objections being that the amount of the tax was excessive. In upholding the tax, Chief Justice White, after remarking that the Act had not been in operation long enough to see whether it was in fact excessive, said:

"Looking at the elements which may have possibly entered into the calculation of the General Assembly as to what would be a reasonable inspection charge, we cannot, to quote from the opinion of the *Patapsco Guano* case, *supra*, 'conclude that the charge is so seriously in excess of what is necessary for the objects designed to be affected as to justify the imputation of bad faith and change the character of the Act.'"

In *Savage vs. Jones (supra)*, the State of Indiana had passed a law providing for the examination and labeling of stock foods, and required all packages sold in that State to be stamped, the fees for such stamps to be expended "*in meeting all necessary expenses in carrying out the provisions of this Act (enumerating them) and for other expenses of the Indiana Agricultural Experiment Station,*" which had entire charge of the enforcement of the Act, including the collection and disbursement of the tax.

Justice Hughes said:

"The contention is made that the statute is a disguised revenue measure; but on a review of its provisions we find no warrant for such a characterization of it. The bill sets forth no facts whatever to show that the charge for stamps is unreasonable in its relation to the costs of inspection, and certainly it cannot be said that aught appears 'to justify the imputation of bad faith and change the character of the act.'"

In *Standard Stock Food Co. vs. Wright*, 225 U. S. 540, an Iowa statute imposing an inspection fee on stock and poultry foods was upheld, Justice Hughes saying:

"We are of opinion that the statute must be considered as an inspection law which it was within the power of the State to enact, and that its fair import is that the fees exacted \* \* \* *are for the purpose of meeting the expenses of inspection.* The bill alleges no facts warranting the conclusion that the charge is unreasonable as compared with this expense."

As was said in the *Rebman* case (*supra*, 41 Fed. 875-6):

"Constitutional inspection laws are those which look only to the public health and welfare, and employ no other expedients to subserve these ends than such as are necessary and proper for the purpose \* \* \*. The law of Virginia far transcends this limitation. Half the moneys paid for inspection are given to inspectors, *and the other half are ordered into the State Treasury.* \* \* \* This law treats the moneys derived from the owners of the meats as general public revenue, and there is no provision declaring or implying that it is to be used for sanitary or inspection purposes. In terms an inspection law, it is in fact a law taxing for the benefit of the State treasury a prime necessary of life, an universal article of human food, and an important commodity of general commerce. No one will pretend that a tax law which avowedly collects a revenue for the public treasury of a State from charges laid upon articles of interstate commerce, brought into the State for sale, is constitutional. Such is the law under consideration, nor can you change its essential character by calling it an inspection law."

In the case at bar, the fact and amount of the diversion are evident. As shown, the maintenance of the Maryland State Fishery Force has not the remotest connection with the inspection of Virginia and New Jersey oysters. The legitimate object of the inspection under the Federal Constitution is confined to the quality and quantity of the oysters brought into Maryland for sale. The act of inspection is the ordinary one of "looking at" and examining an article of commerce. No peculiar situation exists here. This is simply an inspection of a food commodity. The inspector is to inspect "*all oysters*" sold "*in the district to which he is assigned,*" and only those oysters. Not one word of the law contemplates the inspection of oysters caught in Maryland waters and carried directly out of this State for sale in other States. Consequently there is no merit in the State's contention that the inspectors need the aid of the State Fishery Force in preventing Maryland oysters in the shell from being transported directly out of this State.

The statute expressly provides for the inspection of *all oysters actually sold in Maryland*, including oysters shipped from Virginia and New Jersey, and the inspection feature of the statute may be properly placed there solely for the purpose of passing upon the quality and quantity of those oysters. The expense of such inspection, within the limitation prescribed by the Federal Constitution, is the actual cost of inspection, and the tax collected must be devoted to that cost exclusively. The expenses of the State Fishery Force generally are as foreign to the objects and purposes of the inspection as are the expenses of the public schools, to which two-thirds of the tongers' license fees and of the county scrapers' license fees are expressly appropriated by law. If it be found that the State Fishery Force needs more revenue for its maintenance, the Legislature can repeal the diversion of those fees to a confessedly extraneous purpose, or increase the fees which it now collects from those engaged in the industry (tongers' licenses, Section 2; dredgers' and scrapers' licenses, Section 23; pack-

ers' licenses, Section 77), or provide that the revenues from oyster culture now diverted to building State roads and re-shelling natural oyster bars, be applied toward the expense of maintaining the State Fishery Force, which is used to protect and promote oyster culture. But in no event, should the Legislature be permitted to lay tribute upon interstate commerce in the *form* of an inspection law that has annually yielded from \$20,000 to \$30,000 "excess" over the cost of inspection, which excess has been passed into the "Oyster Fund" as a contribution towards the expenses of the State Fishery Force.

### CONCLUSION.

In conclusion, we respectfully submit that Section 69 as re-enacted by Chapter 413 of the Acts of 1910, when tested by its effect on interstate commerce, imposes a tax or charge upon oysters shipped to the appellants from other States which is grossly excessive in amount and is expressly applied to other expenses than the legitimate cost of inspection, and therefore falls within the constitutional inhibitions enforced by this Court in the cases above cited; and by the Maryland Court of Appeals in *Foote vs. Clagett*.

For the reasons above stated the statute in question should be held void and the decree of the Maryland Court of Appeals should be reversed, and the cause remanded to the end that the injunction may be granted.

GEORGE WHITELOCK,  
W. THOMAS KEMP,  
*Solicitors for Plaintiffs in Error.*



IN THE  
**Supreme Court of the United States**

No. 159, OCTOBER TERM, 1913.

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D. E. FOOTE & COMPANY, INC., ET AL., PLAINTIFFS IN  
ERROR,

VS.

CHARLES H. STANLEY, COMPTROLLER OF THE STATE  
OF MARYLAND, DEFENDANT IN ERROR.

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF  
MARYLAND.

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**BRIEF ON BEHALF OF THE  
DEFENDANT IN ERROR.**

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STATEMENT.

This case comes up upon writ of error to the Court of Appeals of the State of Maryland, and involves the validity of an Act of Assembly of the State of Maryland known as Chapter 413 of the Acts of the General Assembly of Maryland, passed at the January Session, 1910, imposing an

inspection charge of one cent per bushel upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels, and upon all oysters sold by commission merchants and others selling by less than the cargo, and providing that the money thus secured should be used to help to defray the expenses of such inspection and the other expenses of the State Fishery force.

The Act also provided for the appointment of special inspectors, not exceeding twenty, at salaries of \$45 per month, and contained other provisions not necessary to refer to herein. The full text of the Act will be found on pages 2 and 3 of the Record.

In the Court of Appeals of Maryland, the constitutionality of the Act was attacked upon three grounds:

1. Because the Act was repugnant to that part of section 8 of Article 1 of the Constitution of the United States which provides that Congress shall have power  
 "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

2. Because the Act was repugnant to that part of section 10 of Article 1 of the Constitution of the United States, which provides that:

"No State shall without the consent of the Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

3. Because the Act was repugnant to Article 15 of the Bill of Rights of the Constitution of the State of Maryland, which provides that

"every person in the State or person holding property therein ought to contribute his portion of public taxes for the support of the Government according to his actual worth in real or personal property; yet fines, duties or taxes may properly and justly be imposed or laid with a political view for the good Government and benefit of the community."

The Court of Appeals held that the Act in question was not in contravention of any of the above recited clauses of the Federal or State Constitution, for the reasons set forth in the Court's opinion, which will be found upon pages 22-29, inclusive, of the Record, to which reference will be made hereafter.

In the Agreed Statement of Facts, appearing on pages 14 and 15, inclusive, of the Record, certain figures are set out from which it appears that the salaries of the measurers and inspectors of oysters from October 1st, 1910, to September 18, 1911, aggregated \$15,093, while the amount realized from the inspection charge of one cent per bushel produced, or should have produced if the tax had been paid, about \$39,000.

It appears also from the Bill of Complaint (Record, page 4), and from the Agreed Statement of Facts (Record, pages 10-11), that of the oysters bought by the plaintiffs in error and subject to the inspection charge of one cent per bushel, a number of bushels were originally taken from the oyster beds of the States of Virginia and New Jersey, but much the larger quantity from the oyster beds of the State of Maryland.

## ARGUMENT.

The Court of Appeals of the State of Maryland having decided that the Act in question does not offend against Article 15 of the Bill of Rights of the Constitution of the State of Maryland, that question is not subject to review by this Court in this proceeding.

*Carstairs vs. Cochrane*, 193 U. S. 10;

*Rasmussen vs. Idaho*, 181 U. S. 198;

*Montana Co. vs. St. Louis Mining and Milling Co.*, 152 U. S. 160.

It is also respectfully contended, that in view of the fact that it appears from the Bill of Complaint and Agreed Statement of Facts that the plaintiffs in error are not complaining of the imposition of any inspection charge upon oysters imported from foreign countries, section 10 of Article 1 of the Constitution of the United States has no bearing upon the controversy now before this Court.

In support of this contention, it is only necessary to quote from the decision of this Court in the case of *New Mexico Ex Rel. McLean vs. Denver and R. G. R. Co.*, 203 U. S., page 49, where this Court states as follows:

"As to the objection predicated upon section 10 of Article 1, that section can have no application to the present case, as that provision directly applies to articles imported or exported to foreign countries. *Patapsco Guano Co. vs. Beard of Agriculture*, 171 U. S. 345 to 350, and cases cited. Moreover, that paragraph of the Constitution expressly reserves to the right of the States to pass inspection laws, and if this law is of that character it does not run counter to this requirement of the Constitution."

There is left, therefore, for consideration by this Court, one question and one question only, namely, whether Chapter 413 of the Acts of the General Assembly of Maryland, passed at the Session of 1910, is in contravention of that part of section 8 of Article 1 of the Constitution of the United States which relates to interstate commerce.

It is conclusively settled by numerous decisions of this Court that the vesting in Congress of exclusive power to regulate interstate commerce does not prohibit the States from passing, in the exercise of the police power, inspection laws, even though such laws operate upon articles of interstate commerce.

New Mexico *Ex Rel. McLean vs. Denver and R. G. R. Co.*, 203 U. S., page 50, *supra*;  
*Patapsco Guano Co. vs. Board of Agriculture*,  
 171 U. S. 345;  
*Neilson vs. Garza*, 2 Woods, 287;  
*Robbins vs. Taxing District of Shelby Co.*, 120 U. S. 489.

We think also that it cannot be successfully controverted that the Act in question is an inspection measure passed by virtue of the police power of the State for the purpose of protecting the oyster industry of the State and of preserving the health of the people of the State as well as for the purpose of protecting the people against fraudulent practices and of securing improvement in the quality of the oyster.

Moreover, just as this Court in 203 U. S. 38, *supra*, took judicial notice of the fact that in the territory of New Mexico and in other similar parts of the West, cattle are required to be branded in order to identify their ownership and that they run at large in great stretches of country with no other means of determining their separate ownership than by the brands or marks upon them, so also in this case this Court will take judicial notice of the fact that the oyster

industry is one of the most important industries of the State of Maryland; that the oyster beds are owned by the State and furnish means of livelihood for a large part of the population thereof, and that the oyster itself is most delicate in character and readily susceptible of contamination, and therefore unless most careful inspection is exercised in connection with it and with its sale as an article of food, the public health will be most seriously menaced, and the wealth of the State greatly diminished.

This case, therefore, in its last analysis comes down to the inquiry as to whether the law in question imposes an inspection charge so excessive as to challenge the good faith of the State of Maryland in enacting it, and so unreasonable as to justify this Court in declaring it unconstitutional.

The Plaintiffs in Error contend that the charge is unreasonable, because it produces revenue that is much more than sufficient to defray the salaries of the inspectors provided for by said act.

The vice in their argument is the ignoring of the intimate connection and relation between the act in question and the other provisions of Article 72 of the Code of Public General Laws of Maryland of which the Act forms a part. The inspection of oysters provided for by Chapter 413 of the Acts of 1910 is only part of the scheme of oyster inspection deemed necessary by the State of Maryland and fully covered by other sections of said Article 72 of the Code. This abundantly appears from the decision of the Maryland Court of Appeals in the case at bar. There the Court said as follows (Record, pages 28 and 29):

"Section 69 is not an independent, isolated enactment, but a component part of a comprehensive system of law embodied in Article 72 of the Code of Public General Laws, title 'Oysters,' and containing 82 sections. Each section therefore must be read in connection with, and construed in reference to, all other sec-



tions. *State vs. Popp*, 45 Md. 438. Even a casual examination of that article shows that an elaborate system of inspection runs through the whole law; that its enforcement is an inseparable part of the duty of the State Fishery Force, and that the expense of such inspection is a component part of all the expenses of the State Fishery Force.

"In addition to the twenty special inspectors provided for by Section 69, Section 68 provides for sixteen general measurers and inspectors for certain designated places, to be appointed by the Governor. Oysters are sold not only at the packing houses throughout the State, but also upon the various waters of the State, to what are called 'buy boats,' and often as seed oysters for transportation beyond the State. To such buyers, the young and unmerchantable oysters are as desirable, if not more so, than the merchantable oysters, and the State Fishery Force is required to see to the inspection of oysters sold to 'buy boats' as well as those sold at the packing houses.

"Sections 7 to 14, inclusive, relate to the culling out of small oysters, and require all measurers and inspectors, and all other officers of the State Fishery Force to supervise the operation of the whole article, and diligently to aid in the enforcement of all its provisions. Culling can only be enforced by inspection. Without it, the young oysters necessary for the preservation of the future food supply afforded by the oyster beds of the State, must soon be destroyed, and the people of the State will be deprived of this inestimable provision of nature, and the thousands who are engaged in that industry will be deprived of a valuable occupation. It is impossible to estimate accurately, in advance, the cost of this necessary inspection. In one season the charge imposed may produce a surplus, while

the next season may result in a deficiency which will absorb the surplus of the preceding season or seasons.

"But enough has been said to show that the expense of inspection mentioned in Section 69 cannot be separated from the wider inspection provided by other sections, or from the general expenses of the State Fishery Force which is charged with the whole duty of inspection, and if the question can be regarded as a judicial one, we have no hesitation in holding that the charge imposed is not excessive for the purposes of inspection. The fact that the proceeds of this charge go into the general oyster fund cannot affect the validity of the law. In *State vs. Applegarth*, 81 Md. 304, Judge Boyd said, 'if the State has the right to impose the license tax, as we hold it has, it can certainly determine what shall be done with the money, as long as no unlawful use is made of it.' And the same was held in *Patapsco Guano Co. vs. Board of Agriculture*, *supra*, in the passage already cited from that decision."

We respectfully submit that the interpretation of Article 72 of the Maryland Code as above set forth by the Court of last resort in Maryland is conclusive and binding upon this Court, and completely and finally disposes of the contention advanced by the Plaintiffs in Error.

*Tampa Water Works Co. vs. Tampa*, 199 U. S. 241;

*Gatewood vs. North Carolina*, 203 U. S. 531;

*Lindsay vs. Natural Carbonic Gas Co.*, 220 U. S. 61.

Even assuming, however, that this Court were disposed to examine for itself the various provisions of Article 72 of the Maryland Code, the correctness of the interpretation of the Court of Appeals of Maryland would be readily apparent.

Section 8 of said Article requires that all oysters taken from the waters of the State of Maryland shall be culled upon the natural bed or bar whence taken, and all shells returned to the said bed or bar as well as all oysters whose shells measure less than two and one-half inches in length from hinge to mouth.

Section 9 makes it a misdemeanor for anyone to have oysters in his possession less than  $2\frac{1}{2}$  inches from hinge to mouth, and clothes the measurers and inspectors and officers of the State Fishery force with power to examine at any time oysters in the possession of any person for the purpose of ascertaining whether there has been a violation of the law.

Section 10 makes it a misdemeanor for anyone to transport or attempt to transport out of the State oysters less than  $2\frac{1}{2}$  inches from hinge to mouth, and the State Fishery Force is charged with the duty of enforcing the provisions of this section and also with the task of distributing upon the natural rocks and bars of the State, oysters found in the possession of persons in violation of said section.

Section 11 makes it unlawful for any packer, commission merchant or any other person to purchase or receive any cargo or any part of a cargo of oysters unless a general inspector, measurer or special inspector shall be present. It provides also for the culling of the cargo. It also provides that if any unmerchable oysters be found a fine shall be imposed, and it further imposes upon the State Fishery Force the obligation and duty of restoring the unmerchable oysters so found to the ground and rocks from which they had been previously unlawfully taken.

Section 14 makes it the duty not only of the general measurers and inspectors of oysters, but also of the officers of the State Fishery Force to aid in the enforcement of the provisions of said Article 72. To that end they are au-

thorized and empowered to enter into any house or boat or any other place where oysters may be dumped or stored in order to inspect the same at any time.

Section 16 of said Article makes it unlawful for any person to take or catch oysters or have oysters in his possession between the 25th day of April and 1st day of September in each and every year, except that oysters caught before the 25th day of April may be disposed of at any time before the 30th day of April.

Section 31 of said Article provides for the creation of an oyster fund for the purpose of maintaining sufficient and proper police regulations for the protection of oysters and for the payment of the salaries of the officers and men of the State Fishery Force and for the supplying, equipping or keeping in repair of the vessels constituting said force.

Other sections of the Article provide specifically for the creation and equipping of the State Fishery Force.

Others in turn provide for the employment of general measurers and inspectors of oysters for the City of Baltimore and for other towns situated in the State of Maryland.

While still others contain provisions relating to oyster culture; the location of oyster beds, the packing of oysters, the shucking of oysters, etc.

We think it is so clearly evident from a mere reading of the sections above specifically referred to, that the cost of the inspection of oysters in Maryland cannot be limited to the mere salaries of the measurers and inspectors, but must also include, in part at least, the expenses of maintaining the State Fishery Force, since said force is charged also with the task of assisting in the carrying out of the inspection laws of the State relating to oysters, that any extended elaboration and discussion of the meaning of the various sections are unnecessary.

Certain it is that the scheme of oyster inspection contemplated by Article 72 does not consist merely of the inspection by the twenty special inspectors provided by Chapter 413 of the Acts of 1910. If that were all the inspection that the law furnished, the oyster industry in Maryland would soon become a thing of the past and the oyster beds would in a short time be completely depleted and denuded. The State Fishery Force is the dominant factor in the situation and the law clearly contemplates, indeed expressly provides that its members shall not only act as inspectors, but shall also see that the laws relating to inspection are strictly and faithfully complied with.

The inspection of the oysters at the bed or bar from which they are taken can be made only through the agency of the State Fishery Force, and without such a prior inspection the later inspection by the special inspectors provided for by Chapter 413 would afford but inadequate protection to the State and to the general public.

Again under Section 11 of said Article 72 whenever the special inspectors upon inspection discover oysters that are unmerchable, full force and effect is only given to their inspection through the agency of the State Fishery Force by the restoring through that agency to their proper rocks and grounds of the unmerchable oysters that the inspection has disclosed.

Can it be properly said that the expense of restoring the undersize oyster is not a legitimate charge against the inspection fee?

If we are correct in this, then it follows beyond peradventure that the inspection fee provided for by Chapter 413 of the Acts of 1910 is not only not excessive, but is hardly sufficient to defray the proper cost of inspection.

The result is the same therefore whether this Court interprets for itself the provisions of Article 72 of the Maryland Code or accepts the interpretation put upon them by the Court of Appeals of Maryland.

It follows, therefore, to use the language of this Court in the case of New Mexico against Denver and R. G. R. Co., *supra*, that the inspection charge of 1 cent per bushel, is certainly not so unreasonable and disproportionate to the services rendered as to attack the good faith of the law and to justify this Court in holding that the State of Maryland, under the disguise of an inspection measure, is attempting to subserve other and different purposes prohibited by the Constitution of the United States.

In conclusion, we contend, employing again the language of this Court, as used in the case of Standard Stock Food Co. vs. Wright, 225 U. S. 549, that the statute in question must be considered as an inspection law which it was in the power of the State of Maryland to enact, and that its fair import is that the fees exacted under its provisions are for the purpose of meeting the expenses of inspection, and that the Act, therefore, is a valid enactment.

EDGAR ALLAN POE,

Attorney-General of the

State of Maryland.

*On Behalf of Defendant in Error.*





**D. E. FOOTE & COMPANY, INCORPORATED,  
v. STANLEY, COMPTROLLER OF THE STATE  
OF MARYLAND.**

**ERROR TO THE COURT OF APPEALS OF THE STATE OF  
MARYLAND.**

No. 150. Argued January 16, 1914.—Decided February 24, 1914.

The Federal Constitution prohibits a State from regulating interstate commerce; but at the same time authorizes it to burden that commerce by the collection of the expenses if absolutely necessary for enforcing its inspection laws.

There is an essential difference between policing and inspection; and a State cannot include the expense of the former as part of the expense of the latter in determining the amount which it can raise as an inspection tax which affects interstate commerce.

As inspection necessarily involves expense, it is primarily for the legislature to determine the amount; and even though the revenue be slightly in excess of the expense the courts should not interfere.

There is a presumption that the legislature will reduce inspection fees to a proper sum if the amount originally fixed proves to be unreasonably in excess of the amount required. *Red "C" Oil Co. v. North Carolina*, 222 U. S. 393.

Effect must be given by the courts to the provisions of the Constitution; and where it does appear that the amount of inspection fees are disproportionate to the inspection service rendered or include something beyond inspection, the tax must be declared void as obstructing the freedom of interstate commerce.

A state statute imposing an inspection tax, the proceeds of which are to be and actually are used partly for inspection and partly for other purposes such as policing state territory, is necessarily void as imposing a burden on interstate commerce in excess of the expenses absolutely necessary for inspection, and so held as to the Maryland Oyster Inspection Tax of 1910.

The question of constitutionality of an inspection law depends not only upon whether the excess proceeds of the tax may be used for other purposes, but whether they actually are so used; and it is the duty of the courts to determine whether the tax is excessive and the excess is

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so used so as to protect citizens against payment of fees not authorized by the Constitution. *Turner v. Maryland*, 107 U. S. 38, distinguished, and *Brimmer v. Rebman*, 138 U. S. 83, followed.

While the excess of a state inspection tax may be valid as a tax on property within the State, if it does not appear that the legislature would have separately imposed such a property tax, the whole tax must be declared void if it is unconstitutional as to interstate commerce.

117 Maryland, 335, reversed.

THE plaintiffs are engaged in packing oysters taken from the waters of Maryland, Virginia and New Jersey and shipped to Baltimore where they are inspected under the provisions of the Maryland Oyster Law. This comprehensive statute contains 82 sections, one of which (§ 69) provides for the appointment of 20 special inspectors, to be paid \$45 per month each, during the season. They are required to inspect all oysters in the district to which they are assigned and to give a certificate to buyer and seller in substantially the following form:

"I hereby certify that I have this day inspected for Captain \_\_\_\_\_ of the schooner \_\_\_\_\_, a cargo of oysters, sold to \_\_\_\_\_, and found the same to contain \_\_\_\_\_ bushels of merchantable oysters, and \_\_\_\_\_ bushels of unmerchantable oysters. . . ."

The section further provides that "a charge of one cent per bushel is hereby levied to help defray the expenses of such inspection and the other expenses of the State Fishery Force, upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels."

The fee was to be charged equally to the buyer and seller and in case it was not paid at the end of the week the property of the party indebted was to be levied on and sold by the Comptroller "as in cases of taxes in default, without further process of law."

The four plaintiffs refused to pay the inspection fees charged against them between October, 1910, and April, 1911. The Comptroller threatened to enforce collection by levy and sale, and they filed a Bill in the Circuit Court of Baltimore City seeking an injunction on the ground that the inspection fees were excessive and constituted a burden on interstate commerce and a violation of the provision of the Constitution that "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The case was heard on an agreed statement of facts which in addition to those above recited, showed that the act of April, 1910, was a reenactment of sections of a prior statute (Code of Maryland, c. 72) which was substantially like the present law with the same charge of one cent a bushel for measuring oysters.

Extracts from various annual Reports of the Comptroller were stipulated into the record. They show that the salaries of the inspectors amounted to about \$14,000 per annum. After the deduction of salaries of these inspectors there was for 1909 and 1910 respectively, an excess of \$22,010 and \$28,680. This annual excess was carried to the credit of the Oyster Fund, provided for both in the repealed and reenacted Oyster Law. In the Report of the Comptroller for 1909 he says: "The tax as to one cent per bushel on all oysters inspected in this State, as enacted by Chapter 488 of the acts of 1908, has been sufficient not only to pay the cost of such inspections, but also to carry to this [Oyster] Fund the balance or excess of \$22,010.95."

In the Report for 1910, he says: "During the fiscal year ending September 30, 1910, the receipts of taxes on oysters . . . amounted to \$43,671.94. The disbursements for account of salaries of the measurers and inspectors of oysters were \$14,991, leaving a balance or ex-

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cess of \$28,680.94, which was carried to the credit of the Maryland State Oyster Fund. . . .

"The receipts from dredging and tonging licenses show a heavy shrinkage by reason of fewer boats being engaged in the industry; nevertheless the excess tax of one cent per bushel on oysters sold, amounted to \$28,680.94, making the fund self-sustaining for the year" (1911).

Section 30 of the Oyster Law referred to provides that the Oyster Fund shall only be drawn upon for "the purpose of maintaining sufficient and proper police regulations for the protection of fish and oysters in Maryland waters and in the payment of the officers and men and keeping in repair and supplying the necessary means of sailing the boats and vessels of the State Fishery Force."

After a hearing and consideration of the facts submitted, the Circuit Court held that the inspection tax was valid, refused to enjoin its collection, and dismissed the Bill. That judgment was affirmed by the Court of Appeals (117 Maryland, 335), and the case was brought here by writ of error.

*Mr. George Whitelock and Mr. W. Thomas Kemp* for plaintiffs in error:

The Federal Constitution vests Congress with the exclusive power to regulate interstate commerce, and prohibits a State from laying duties on imports or exports, except such as may be absolutely necessary for purposes of inspection. A State is accorded the right to pass inspection laws and to collect such amounts as may be necessary to pay the expense thereof. *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345; *Robbins v. Shelby Taxing District*, 120 U. S. 489; *Foote v. Clagett*, 116 Maryland, 235.

Under Article I the State of Maryland can impose no tax upon Virginia and New Jersey oysters, except such as may be reasonably necessary for inspection purposes to secure the due quality and measure of the oysters shipped

from Virginia and New Jersey into Maryland and inspected in Maryland at the termination of the shipment.

As to the scope of state inspection laws, see *Gibbons v. Ogden*, 9 Wheat. 1, 203; *Brown v. Maryland*, 12 Wheat. 419; *Foster v. New Orleans*, 94 U. S. 246; *Turner v. Maryland*, 107 U. S. 38, 55, aff'g 55 Maryland, 240; *People v. Compagnie Generale*, 107 U. S. 59, 62.

Interstate commerce can only be impeded by such local statutes as seek fairly and honestly to protect the citizens of a State from the fraud of short measures, or injury by introduction of dangerous or unwholesome articles.

To introduce a purely extraneous charge as a cost of inspection, or to appropriate the tax collected to a foreign purpose, would take the statute beyond the permitted limitation upon freedom of interstate commerce. It would no longer be "an inspection law," but "a revenue measure."

As to the extent to which courts pass upon constitutionality of inspection laws, see *Foote v. Clagett*, 116 Maryland, 240; *Brown v. Maryland*, 12 Wheat. 419, 466; *Robbins v. Shelby Taxing District*, 120 U. S. 489; *Leisy v. Hardin*, 135 U. S. 100, 108, all holding that Congress has the exclusive power over interstate commerce, and that state legislatures may enact only such laws pertaining thereto as come within certain well defined limitations.

The various state legislatures in the exercise of the privilege thus given them to enact proper inspection laws cannot also be regarded as the final judges of the legality of their own acts as would follow if the courts are not to be permitted to decide whether a particular legislature has exceeded its privilege and passed a law imposing a tax which, on its face, or in necessary effect, is to be devoted toward other purposes than the cost of inspection. *Turner v. Maryland*, 107 U. S. 38; *McLean v. Denver & R. G. R. Co.*, 203 U. S. 38, distinguished, and see *Mugler v. Kansas City*, 123 U. S. 623, 661; *In re Rebman*, 41 Fed. Rep. 867,



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aff'd *Brimmer v. Rebman*, 138 U. S. 78; *Minnesota v. Barber*, 136 U. S. 313, 319; *Fertilizer Co. v. Board of Agriculture*, 43 Fed. Rep. 609; *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345; *Postal Company v. Taylor*, 192 U. S. 64; *West. Un. Tel. Co. v. Kansas*, 216 U. S. 1, 27; *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 381, 394; *Savage v. Jones*, 225 U. S. 501.

The cases cited hold that the Federal Constitution contemplates and permits only such state inspection taxes as are reasonable in amount, single in purpose, and assessed under a law designed for the protection of the health or safety of the community, as distinguished from a tax which, in whole or in part, levies tribute upon interstate commerce for the enrichment of the coffers of the taxing State itself.

Section 69, as reenacted, when tested by its effect on interstate commerce, imposes a tax or charge upon oysters shipped to the appellants from other States which is grossly excessive in amount and is expressly applied to other expenses than the legitimate cost of inspection, and is therefore unconstitutional both under the state and Federal Constitutions.

*Mr. Edgar Allan Poe*, Attorney General of the State of Maryland, for defendant in error:

The highest court of the State having decided that the act does not offend the state constitution, that question is not subject to review by this court, *Carstairs v. Cochrane*, 193 U. S. 10; *Rasmussen v. Idaho*, 181 U. S. 198; *Montana Co. v. St. Louis Mining Co.*, 152 U. S. 160; as it appears from the complaint and agreed statement that plaintiffs in error are not complaining of the imposition of any inspection charge upon oysters imported from foreign countries, § 10 of Art. I, Const. of United States has no bearing. The only question is whether c. 413, Acts Gen. Ass., Maryland, of 1910, is in contravention of that part of § 8,

Art. I, Const. of the United States relating to interstate commerce.

The vesting in Congress of exclusive power to regulate interstate commerce does not prohibit the States from passing, in the exercise of the police power, inspection laws, even though such laws operate upon articles of interstate commerce. *McLean v. Denver & R. G. R. Co.*, 203 U. S. 50; *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345; *Neilson v. Garza*, 2 Woods, 287; *Robbins v. Shelby Taxing District*, 120 U. S. 489.

The act is an inspection measure passed by virtue of the police power of the State for the purpose of protecting the oyster industry of the State and of preserving the health of the people of the State as well as for the purpose of protecting the people against fraudulent practices and of securing improvement in the quality of the oyster.

This court will take judicial notice of the fact that the oyster industry is one of the most important industries of the State of Maryland; that the oyster beds are owned by the State and furnish means of livelihood for a large part of the population thereof, and that the oyster itself is most delicate in character and readily susceptible of contamination, and therefore unless most careful inspection is exercised in connection with it and with its sale as an article of food, the public health will be most seriously menaced, and the wealth of the State greatly diminished.

The law in question does not impose an inspection charge so excessive as to challenge the good faith of the State in enacting it, and so unreasonable as to justify this court in declaring it unconstitutional.

The plaintiffs in error contend that the charge is unreasonable, because it produces revenue that is much more than sufficient to defray the salaries of the inspectors provided for by said act.

The state court held that § 69 is not an independent,

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isolated enactment, but a component part of a comprehensive system of law embodied in Art. 72, Code of Pub. Gen. Laws, title "Oysters," containing 82 sections. Each section therefore must be read in connection with, and construed in reference to, all other sections. *State v. Popp*, 45 Maryland, 438.

The expense of inspection mentioned in § 69 cannot be separated from the wider inspection provided by other sections, or from the general expenses of the State Fishery Force which is charged with the whole duty of inspection, and the charge imposed is not excessive for the purposes of inspection. The fact that the proceeds of this charge go into the general oyster fund cannot affect the validity of the law. *State v. Applegarth*, 81 Maryland, 304.

The interpretation of Art. 72 of the Maryland Code as set forth by the highest court of Maryland is conclusive and binding upon this court, and completely and finally disposes of the contention advanced by plaintiffs in error. *Water Works Co. v. Tampa*, 199 U. S. 241; *Gatewood v. North Carolina*, 203 U. S. 531; *Linsdley v. Natural Carbonic Gas Co.*, 220 U. S. 61.

Assuming, however, that this court were disposed to examine for itself the various provisions of Art. 72, the correctness of the interpretation of the state court is apparent.

The cost of inspection of oysters cannot be limited to the mere salaries of the measurers and inspectors, but must also include, in part at least, the expenses of maintaining the State Fishery Force, since that force is charged also with the task of assisting in carrying out the inspection laws of the State relating to oysters.

The scheme of oyster inspection contemplated by Art. 72 does not consist merely of the inspection by the twenty special inspectors provided by chapter 413. If that were all the inspection that the law furnished, the oyster industry in Maryland would soon become a thing of the past and

the oyster beds would in a short time be completely depleted and denuded. The law expressly and necessarily provides that the State Fishery Police shall not only act as inspectors, but shall also see that the laws relating to inspection are strictly and faithfully complied with.

In fact the inspection fee provided for by chapter 413 is not only not excessive, but is hardly sufficient to defray the proper cost of inspection.

The inspection charge of one cent per bushel, is not so unreasonable and disproportionate to the services rendered as to attack the good faith of the law and to justify this court in holding that the State, under the disguise of an inspection measure, is attempting to subserve other and different purposes prohibited by the Federal Constitution. *McLean v. Denver & R. G. R. Co.*, *supra*; *Standard Stock Food Co. v. Wright*, 225 U. S. 549.

MR. JUSTICE LAMAR, after making the foregoing statement of facts, delivered the opinion of the court.

The plaintiffs are engaged in the business of packing oysters in the City of Baltimore, and, during the season of 1910-11 purchased 736,000 bushels, of which 494,000 bushels were taken from the waters of the State of Maryland, 228,000 from the waters of the State of Virginia, and 14,118 from the State of New Jersey. These oysters were inspected in Baltimore by officers appointed under the provisions of the Maryland statute, which fixed an inspection fee of one cent per bushel to be paid, one-half by the seller and one-half by the buyer. The plaintiffs having refused to pay the inspection charge, assessed against them, litigation followed. The decision was against their claim of immunity under Art. I, §§ 8 and 10, of the Constitution. The case was then brought here on the ground that the inspection fee of one cent per bushel charge was excessive, that it interfered with interstate

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commerce and levied an unlawful impost duty upon goods shipped into Maryland from other States.

1. The Constitution prohibits a State from regulating interstate commerce, but at the same time authorizes the collection of the necessary expenses of its inspection laws with the result that interstate commerce is to that extent lawfully burdened. Inspection is intended to determine the weight, condition, quantity and quality of merchandise to be sold within or beyond the State's borders. It is usually "accomplished by looking at or weighing or measuring the thing to be inspected," (*People v. Compagnie Gen. Transatlantique*, 107 U. S. 59, 62), though there may be cases in which some degree of supervision or policing is required in order to secure the proper certification of the property intended for sale or shipment. But while the two duties may sometimes overlap, there is a difference between policing and inspection, and if the State imposes upon one set of officers the performance of the two duties and pays the whole or a part of the joint expenses out of inspection fees, it must be made to appear that such tax does not materially exceed the cost of inspection—the burden in such cases being on those seeking to collect the combined charge. For if the cost of inspection is so intermingled with other expenses as to make it impossible to separate the two interstate commerce might be burdened by fees collected both for inspection and revenue,—for a lawful and for an unlawful purpose. Such is the contention here, the plaintiffs insisting that the fees are collected partly for inspecting oysters and partly for the cost of policing the waters of Chesapeake Bay; while the defendant insists that the charge is collected and spent solely for inspection.

2. Inspection necessarily involves expense and the power to fix the fee, to cover that expense, is left primarily to the legislature which must exercise discretion in determining the amount to be charged, since it is im-

possible to tell exactly how much will be realized under the future operations of any law. Beside, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the Legislature will reduce the fees to a proper sum. *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380, 393. But when the facts show that what was known to be an unnecessary amount has been levied, or that what has proved to be an unreasonable charge is continued, then, they are obliged to act in the light of those facts and to give effect to the provision of the Constitution prohibiting the collection by a State of more than is necessary for executing its inspection laws. In such inquiry they treat the fees fixed by the Legislature for inspection proper as *prima facie* reasonable and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered. Still, effect must be given to the provision of the Constitution, which, in unusual and emphatic terms, permits the State to collect only what is "absolutely necessary." If, therefore, it is shown, that the fees are disproportionate to the service rendered; or, that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void because such costs, by necessary operation obstruct the freedom of commerce among the States. *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38; *Brimmer v. Rebman*, 138



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U. S. 78, 83; *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64; *Patapsco Co. v. North Carolina*, 171 U. S. 345, 354; *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380, 394; *Savage v. Jones*, 225 U. S. 501.

3. The unreasonableness of inspection fees may appear from the language of the act, as in *Foote v. Clagett*, 116 Maryland, 228, where a charge of two cents a bushel on oysters was collected, under a statute which provided that one-half was to be used for inspection and the other half was to be used for replacing shells on the natural beds for the purpose of increasing the oyster crop. That law was declared void by the Court of Appeals of Maryland, because of the provision that one-half of the inspection fee should be applied to other than the inspection purpose. The present statute contains language susceptible of the same construction, for it provides for an inspection fee of one cent per bushel to be "levied to help pay the salary of the inspectors and the other expenses of the State Fishery Force."

As the act itself makes a clear distinction between inspection expenses "and other expenses," the question at once arises as to whether the State did not provide for the collection of more than was "absolutely necessary for executing its inspection laws," thereby rendering the statute void because it included the cost of "something beyond legitimate inspection to determine quality and condition." *Brimmer v. Rebman*, 138 U. S. 83.

This objection, apparent on the face of the act, was sought to be answered by the suggestion that § 69, which levied the tax, was but "a part of an elaborate system of inspection running through the whole law, the enforcement of which was an inseparable part of the duty of the State Fishery Force," and that "the expense of such inspection is a component part of all the expenses of that force." 117 Maryland, 335. It was urged that, in addition to inspecting oysters as they were unloaded from ves-

sels, the Fishery Force performed other inspection duties such as preventing, what were known as, "buy-boats" from secretly carrying culls and other unmerchantable oysters beyond the limits of the State for consumption or transplanting. But even if it be conceded that these, or like services, could be classed as inspection within the meaning of the Constitution, they form only a part of the many and various duties imposed upon the Fishery Force. That organization is supplied with men and boats and required to patrol, day and night, the waters of Chesapeake Bay to prevent unlicensed boats from taking oysters and all boats from improper tonging or dredging and to see that shells and culls are returned to the natural beds—provisions intended for the preservation of the supply rather than determining the merchantable quality of oysters offered for sale. Other non-inspection duties might be named, but the foregoing will suffice to show that inspection, policing and business expenses are to be paid for out of inspection fees.

3. But the commingling of these various duties, paid for out of a fund raised for inspection, does not necessarily show that the fee is excessive. For the presumption of invalidity arising from such intermingling might be met by carrying the burden of showing that, while the statute required payment out of such joint fund, the collections were not sufficient, but only helped, to pay the definitely ascertained expenses of inspection. The question of reasonableness, therefore, may be considered in the light of the practical operation of the law with a view of determining, with reasonable certainty, the permanent relation between the amount collected and the cost of inspecting. The Court of Appeals of Maryland, following the intimation in *Turner v. Maryland*, 107 U. S. 38, declined to pass on the question, upon the ground that a court could not decide whether "a charge or duty under an inspection law is or is not excessive." That suggestion,

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however, is opposed to the distinct rulings in *Brimmer v. Rebman*, 138 U. S. 83, and other cases above cited, which hold that it is the duty of the courts to pass upon the question, so as to protect the private citizen against the payment of inspection fees, larger than those authorized by the Constitution.

4. The Maryland statute provided for that kind of inspection that could be performed by 'looking at or measuring the thing to be inspected' (107 U. S. 62). It fixed the amount of salary to be paid the inspectors for such services, so that the cost was definitely known. The receipts, too, are reasonably certain in view of collections in the past.

The present statute is a reenactment of an old law levying the same charge of one cent per bushel. Under the operations of that law it appeared that about 4,000,000 bushels were inspected each year, producing a revenue of \$40,000, one-third of which was sufficient to pay the salaries of the inspectors, the other two-thirds being appropriated to the "other expenses of the Fishery Force." The Comptroller in his Annual Reports called the attention of the legislature to the fact that, as required, this "excess" had been credited to the Oyster Fund. This fund was to be used—not for inspection purposes—but for "maintaining sufficient and proper police regulations for the protection of fish and oysters in Maryland waters and in the payment of the officers and men and keeping in repair and supplying the necessary means of sailing the boats and vessels of the State Fishery Force."

Even during the year following the enactment of the new statute and the failure of many to pay, pending the decision as to the validity of the tax, the collections were in excess of the cost of inspection. In the light of the operation of the previous act and the failure to show that the amount collected under the new, would not be more than was necessary for the expenses of inspection proper,

the present statute must be held to be void. The excess collected may have been valid as a tax on property in Maryland, but was a burden on interstate commerce when levied upon oysters coming from other States. This fact renders the whole tax void, because there is no claim that the intrastate commerce can be separated from the interstate shipments; or that the legislature would have taxed one and left the other untaxed.

*Judgment reversed and the case remanded for further proceedings not inconsistent with this opinion.*